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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 16

LOUIS KANN ET AL., APPELLANTS,

vs.

CAROLINE KING, APPELLEE.

BRIEF FOR APPELLANTS.

WM. G. JOHNSON,
Counsel for Appellants.

LAW REPORTER PRINTING CO., WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 202.

LOUIS KANN ET AL., APPELLANTS,

vs.

CAROLINE KING, APPELLEE.

BRIEF FOR APPELLANTS.

This is an appeal from a decree of the Court of Appeals of the District of Columbia, rendered on the eighth day of March, 1905 (Rec., p. 492), affirming the final decree in the cause by the Supreme Court of the District of Columbia, entered on the thirtieth day of June, 1904 (Rec., pp. 482–4).

The Principal Issue in the Case.

The controlling issue in this case is one of law concerning the rights of parties under a sealed contract. The contract is a lease for years, on condition, *inter alia*, that the lessee pay the taxes, with right, in the lessor, of reentry for breach of the condition. The lessee broke the condition, the property was sold for the taxes, the lessee failed and refused to redeem, the sale became irredeemable, a tax-deed, made by express terms of statute "prima

facie evidence of a good and perfect title in fee simple," was executed conveying the title to a stranger.

The main question resulting from these facts is: Can a *court of equity deprive the lessor of* this contract right of re-entry at the suit of the tenant, upon the suggestion, in the bill, that the tax deed, though valid on its face, can be annulled through judicial proceedings, because of alleged irregularity in the tax sale, and can a court of equity, by injunction, preserve the possession of the defaulting tenant and restrain the landlord's re-entry, pending a judicial proceeding by the tenant against the tax title, which, if adversely decided, will extinguish the lessor's reversion?

The court below has decided this question in the affirmative, which decision, it is respectfully submitted, is erroneous in law, dangerous in consequences, and tends to imperil the fee simple title of all landlords in this District.

The Record and Proceedings.

The original bill was filed by the appellee, Caroline King, the tenant of the premises in controversy and assignee of the lease thereof, against Mrs. Marianne A. B. Kennedy, the lessor of the premises, and against these appellants, as the parties interested in a tax title to the same.

The principal defendant, Mrs. Kennedy, died the day the bill was filed (Rec., p. 27), and the cause was revived against her executor, Henry Randall Webb, and Mrs. Maria G. Dewey, alleged to be the sole heir at law of Mrs. Kennedy (Rec., pp. 26–29).

The objects of the proceeding, as set forth in the prayers of the original bill, are as follows:

(1) To relieve the complainant, a tenant, from the forfeiture of a lease, admittedly incurred through her failure to pay taxes, as covenanted in the lease.

(2) To enjoin the reversioner from enforcing that forfeiture and from dispossessing the tenant.

(3) To have a tax sale and tax deed of the premises, resulting from the non-payment of the tax by the complainant tenant, decreed, to be null and void.

(4) To enjoin these appellants, Louis and Sigmund Kann and Myer Cohen, from setting up any right or title under such tax sale (Rec., p. 12).

Upon a preliminary hearing an injunction *pendente lite* was granted (Rec., pp. 33, 106), from which the defendant Webb appealed to the Court of Appeals of the District of Columbia (Rec., p. 108), which court affirmed the order (Rec., p. 113).

Thereupon the cause proceeded to hearing on the merits, and a final decree was entered granting all the relief prayed by the bill, and adjudging one-half the costs against the complainant and the other half against these appellants (Rec., pp. 482–3).

From this final decree these appellants and the defendant Webb prosecuted separate appeals to the Court of Appeals of the District of Columbia (Rec., p. 483), the defendant, Mrs. Dewey, declining to join in or prosecute any appeal (Rec., p. 484).

Upon these appeals the Court of Appeals of the District of Columbia affirmed the decree of the Supreme Court of the District of Columbia (Rec., p. 492), and these appellants and the appellant Webb prosecuted separate appeals to this court.

Statement.

The record is very voluminous, but, in the opinion of counsel for these appellants, contains a mass of matters wholly irrelevant to the case made by the pleadings and immaterial to be considered on this appeal.

Counsel for these appellants will, therefore, endeavor,

in this statement, to bring to the attention of the court, in the chronological order of their occurrence, the material facts and events out of which the litigation arises, and with respect to which relief is sought by the bill and was granted by the decrees in the courts below.

The Facts of the Case.

The litigation arises out of the following facts:

In July, 1890, Marianne A. B. Kennedy demised to Henry King, jr., premises No. 715 Market space, in this city, for a term of *three* years, from October 1, 1890, at $2,400 per annum, which term was, by certain renewals or extensions, prolonged for *fifteen* years additional, or until October 1, 1908, without any increase of the rental or other obligations of the lessee (Rec., pp. 13–16).

The property embraced in the lease under the description of "715 Market space" is composed of three parcels of land, namely:

Lot A (the main body of the land) and parts of lot 3 and of lot 5 in square 432, the whole being improved by a single building, the premises known as 715 Market space (Rec., p. 37, plat, Rec., p. 54).

By the terms of the lease it was covenanted on the part of the lessee, *inter alia*, that the lessee should—

> "during the continuance and until the end and determination of the said term, for which the said premises are demised, pay, or cause to be paid, in each and every year thereof, the taxes, general and special, of every character and description assessed against and levied upon the said premises by the authorities of the general or local government" (Rec., p. 14).

This requirement was made a *condition* of the original demise (Rec., pp. 13, 14), and repeated in each renewal (Rec. p. 16).

Lease Assigned—Harry King in Sole Control.

The original lessee died August 15, 1897 (Rec., pp. 2, 155), and on August 26, 1897, the lease of the premises, the stock therein, and the business there conducted were assigned to his widow, Caroline King, the complainant (Rec., pp. 17, 187).

Caroline King, however, had nothing to do with the lease or the business (Rec., pp. 186–191). From August, 1897, till the spring of 1898, Harry King, her son, had charge of the finances (Rec., p. 191). In the spring of 1898 Caroline King and three of her sons formed a partnership as to the business conducted in these premises (Rec., p. 190), of which business the sons, principally Harry King, were the real managers and in entire control (Rec., pp. 153–155, 184, 186, 187, 193, 194).

The business of this firm, actually conducted in the demised premises (715 Market space), was in charge of one of the sons (Rec., pp. 153, 155), and Caroline King was not there (Rec., p. 155). The rent for these premises was paid out of the firm business there conducted, and out of the firm account, by the firm checks (Rec., pp. 195–6).

The payment of the taxes on the demised premises, so far as paid at all, was also made from the funds of this firm by check of the firm (Rec., pp. 169, 179, 279, 280, 284).

This was a matter in the exclusive charge of Harry King, who, the record shows, had had a long and varied experience in the matter of the payment of real estate taxes and of the redemption of real property from tax sales (Rec., pp. 168-9, 170, 171, 183-4, 192-4, 229, 279, 280-4), and he was fully conversant with the requirement under the lease to pay the taxes on this property and with the times when the taxes fell due (Rec., pp. 187-8).

Tenant Makes Six Successive Defaults in Tax Payments—Irredeemable Tax Sale to Wiltsie Results.

From the assignment of the lease, in August, 1897, to October, 1901, the only instalment of taxes which was paid when due was the one accruing due and payable in May, 1901.

Every other tax accruing due during this entire period was either not paid at all or only after it had become in default and subject to penalties, and in some instances by way of redemption after a sale of the property for such default (Rec., pp. 168–9, 170, 187–9, 279–284).

Of the many instalments of taxes not paid was the one for the second half of the year ending June 30, 1898, payable in May, 1898 (Rec., p. 3, pars. 5 and 6 of bill). This default having continued until April, 1899, the principal portion of the property, lot A, was sold for said tax on April 13, 1899, to one Charles H. Wiltsie (Rec., p. 3, par. 6 of bill), and this sale became irredeemable by lapse of time in April, 1901, under the terms of the statute.

A tax sale certificate, made assignable by the statute, was issued to Charles H. Wiltsie on April 25, 1899 (Rec., pp. 17, 18).

Lessor Discovers Facts of Default in Tax Payments and of Irredeemable Tax Sale.

On the 19th or 20th of September, 1901, one Charles H. Knight informed the defendant, Louis Kann, of the tax sale, under the impression that said Kann was the occupant of the property, and said Kann informed Knight he was not the occupant and referred Knight to the defendant Webb as the counsel of the owner, Mrs. Kennedy (Rec., pp. 65, 447–8). Subsequently Kann informed his counsel, defendant Cohen, of Knight's visit and communication, but nothing further was said or done by either the Kanns or Cohen with respect to the tax sale (Rec., pp. 358–9).

At this time Knight was wholly unknown to the defendants, Kann, Cohen, and Webb (Rec., pp. 447–8, 359, 286).

On the 25th of September Knight called upon Webb and informed him of the tax sale (Rec., pp. 286–7), which information Webb verified the next day, the 26th, by an examination of the tax records, and also discovered that the tax sale had become irredeemable by lapse of time (Rec., p. 287). This was Webb's first knowledge of the fact of the tax default and sale (Rec., p. 293).

On the 26th of September, 1901, after his investigation at the tax office, Webb informed his client, Mrs. Kennedy, of the fact of the tax default and sale and of her legal right to terminate the lease, leaving her to decide upon her course of action (Rec., pp. 79, 287, 348–50, 356).

On the 27th of September, 1901, which was a Friday (Rec., p. 287), being about to leave the city and not having previously cautioned his client not to receive rent if she decided to enforce the forfeiture, Webb wrote her to that effect (Rec., pp. 287, 307, 348). He then went to New York (Rec., pp. 287, 348) and returned to his office on Monday morning, September 30, 1901 (Rec., pp. 287, 348), and found there a letter from Mrs. Kennedy, dated Sunday evening (Rec., pp. 287, 307, 308, 348).

That letter concludes thus:

> "You say I must not receive the rent, which he will probably send me by mail on Tuesday morning —but I don't see how I can refuse it unless I know when* I am to get another tenant" (Rec., p. 308).

Lessor Seeks New Tenant—Offers Property to Appellants.

Webb understood this as an instruction from his client to seek another tenant in the place of the Kings (Rec., pp. 80, 308–9, 350), and that same morning called upon

*_Where_ in copy (Rec., p. 95) and so read and understood by defendant Webb (Rec., p. 307).

the defendant Cohen, the counsel of the Kanns, to inquire if the Kanns would rent the property (Rec., p. 287), the Kanns having previously, in June, 1901, intimated a willingness to rent the property at $300 per month (Rec., pp. 287–8, 305–6). At this interview Webb informed Cohen that the Kings had failed to pay the taxes and that the consequent forfeiture of the lease was to be enforced by his client, Mrs. Kennedy (Rec., pp. 311, 360).

Cohen thereafter conferred with his clients by telephone (Rec., p. 360), and about 1 o'clock the same day informed Webb of the Kanns' reply, that they would agree to take the property at the higher rental provided possession were given and their agreement would not be used to compel the Kings to pay a higher rent (Rec., pp. 287, 311–12, 350–1, 360–1).

At this interview Webb, in course of conversation, informed Cohen that Wiltsie was the purchaser at the tax sale and that the sale had become irredeemable by lapse of time (Rec., pp. 95, 360, 361). Cohen then suggested to Webb that he, Webb, buy the tax sale certificate from Wiltsie, to which Webb replied that there was no necessity for his, Webbs', purchasing it, whereupon Cohen jestingly remarked, "I believe I'll buy it," and Webb responded, "Don't do that; don't add that complication," or words to that effect (Rec., pp. 95, 328–9, 360–1). At this time Cohen had no idea of buying the tax sale certificate, and his remark was made entirely in jest (Rec., p. 361).

The same day, about 4.30 p. m., Webb informed his client, Mrs. Kennedy, of the willingness of the Kanns to rent the property upon the terms reported by Cohen, and advised her to enforce the forfeiture (Rec., pp. 288, 311, 348). Mrs. Kennedy acquiesced in this advice, and instructed Webb to inform her physician and friend, Dr. Fry, thereof, and of her decision to enforce the for-

feiture; which instructions Webb carried out that same afternoon (Rec., pp. 80, 324).

Wiltsie Offers to Allow Tenant to Redeem Tax Sale—Tenant Refuses to Redeem.

Between the 24th of July, 1901, and the 30th of September, 1901, other transactions material to be considered had taken place between the Kings and Wiltsie with respect to the tax default, but of which all the defendants were entirely ignorant (Rec., pp. 47, 61, 67, 80, 81).

In July, 1901, after this certificate had become irredeemable under the law, Wiltsie opened negotiations, by correspondence, with Caroline King (Rec., p. 285) seeking to have the tax sale redeemed, which correspondence was taken charge of by Harry King (Rec., pp. 172–176, 183–4), but involved only chaffering over the price and the tax sale was never redeemed (Rec., pp. 173–6, 179–182).

On the 24th of July, 1901, Wiltsie wrote to complainant informing her of his purchase of sublot A, saying, among other things:

> "I am *now entitled to a deed to the property*, but I will *surrender the tax certificate without obtaining a deed* if you will give this matter immediate attention. *Delay will be entirely at your own risk*" (Rec., p. 285).

In a postscript he added the following statement:

> "I am informed that you are interested in the premises *as owner or mortgagee*. If I am wrongly informed I shall esteem it a favor if you will kindly state that fact and *give me the name and address of some interested party*" (Rec., p. 285).

On July 30, 1901, Harry King wrote Wiltsie, merely acknowledging the letter, and saying:

"We are willing to pay a reasonable amount for the redemption of same. Please advise us and oblige" (Rec., p. 273). He then consulted his counsel, Mr. Tobriner, about it (Rec., pp. 172–189), and was advised that the tax sale was invalid and incapable of enforcement (par. 7 of bill, Rec., pp. 4, 172, 184).

On August 1, 1901, Wiltsie replied, offering to surrender the certificate upon payment of $294.31 (Rec., p. 174), to which no response was sent until August 10, 1901, when a clerk of King's wrote to Wiltsie, merely announcing that Harry King was out of town and the matter would be brought to his attention on the following Monday [August 12] (Rec., p. 174).

On September 17, 1901, Wiltsie wrote, acknowledging the letter of August 10, and saying, "I have heard nothing further with reference to the matter" (Rec., p. 175). On September 21, 1901, Harry King wrote to Wiltsie, offering to redeem the tax sale at a reduction of $50 from Wiltsie's price (Rec., p. 55), and on the 24th of September, 1901, Wiltsie's clerk wrote offering to settle at a reduction of $25, concluding thus:

> "Believing that you will accept this offer, I have today sent these papers to the Central National Bank of Washington, with receipt on you for $272.90, where they will be open to your examination, and payment can be made. Please call at the bank *upon receipt of this letter and take up the papers promptly*" (Rec., pp. 175–6).

King did not reply to this letter nor do anything in pursuance of it (Rec., p. 176) until October 2, 1901, *after* he received Mrs. Kennedy's letter of the 1st, notifying him that she had terminated the lease because of the Kings' failure to pay the taxes and of their allowing the property to be sold at tax sale (Rec., p. 177).

He then attempted to take up the tax sale certificate by payment at the bank, but it was too late, as the certificate had been returned to Wiltsie the day before (Rec., p. 179).

Lessor Decides to Re-enter—Gives Notice of Forfeiture to Tenant.

On October 1, 1901, Mrs. Kennedy, in execution of the advice previously given by her counsel, the defendant Webb, wrote and sent her notice to the Kings, refusing the rent sent by the Kings on the 30th of September and announcing the forfeiture of the lease (Rec., pp. 7, 20, 176, 177).

The letter is as follows:

"*1630 R. I. Ave., Oct. 1, 1901.*

"To MRS. H. KING, JR.:

"I have only learned within the last few days that you have forfeited your lease of premises 715 Market space by neglecting to pay the taxes and allowing the property to be twice sold at tax sales.

"The lease being thus vitiated and by advice of my attorney, I must decline receiving any further rental from you.

"For fuller explanation of my action in the matter, I refer you to Mr. H. Randall Webb.

"M. A. B. KENNEDY" (Rec., p. 177).

Upon receipt of this letter, on the morning of October 2, 1901, before banking hours, Harry King consulted his counsel about it (Rec., p. 178), then called upon Webb and after some conversation on the subject asked Webb if he objected to his going to see Mrs. Kennedy. Upon being informed by Webb that he did object and that King must transact his business with him, Webb, King says he told Webb he would go to Mrs. Kennedy and did go to her house and attempt to see her, but she denied herself to him (Rec., pp. 179–80).

On October 4, 1901, Mrs. Kennedy executed and had served upon Caroline King a formal notice to quit and surrender up possession of the property (Rec., pp. 349–350, 353, 474–5).

Appellants Acquire Tax Title From Wiltsie.

In the meantime, upon consideration, the idea of buying the tax sale certificate, which Cohen had, in jest, on September 30, suggested to Webb he would do, impressed Cohen more favorably, and between 3 and 4 o'clock that afternoon he had a conference with the Kanns, in which he suggested that they allow him to buy the tax sale certificate and hold it for their benefit. After consideration of the matter, the Kanns left it to Cohen's discretion to purchase the tax sale certificate or not, agreeing to furnish the necessary funds and to stand by the transaction, should he so decide (Rec., pp. 43, 44, 66, 67, 361, 362).

After leaving Dr. Fry's house whither he had gone, in compliance with Mrs. Kennedy's request, on September 30, (Rec., p. 324) Webb went to his own home, reaching there about 6 o'clock, and found the defendant Cohen and his partner, Adolph G. Wolf, on his doorstep awaiting admission (Rec., pp. 288, 312, 324, 364).

Cohen then informed Webb that he, Cohen, was going that night to Rochester to purchase the tax sale certificate from Wiltsie, saying that they were then dealing at arm's length (Rec., pp. 288, 324). Webb expostulated with him, but Cohen was positive and insisted upon going and executing his project (Rec., pp. 312, 313, 324, 325, 364).

Cohen left by the midnight train, arriving in New York the next morning, October 1, 1901, and reaching Rochester at about 3.20 p. m. the same day (Rec., pp. 366–7).

The first knowledge that defendant Cohen had of the fact that this tax sale certificate had been sent to Washington for redemption or that the Kings had had any

opportunity to redeem it was when he was so informed by Wiltsie, in Rochester, on the afternoon of October 1, 1901 (Rec., pp. 47, 61, 368–9), and these facts were not known to defendant Webb until after the 3d of October, 1901 (Rec., pp. 80–81, 332).

At 2 o'clock p. m. of the same day, October 2, Cohen received at Rochester the tax certificate from Wiltsie's clerk assigned to himself (Rec., pp. 18, 369) and left at 2.30 p. m. for Washington by way of New York City, arriving here the morning of October 3 (Rec., p. 369). The same day a deed was executed by the authorities of the District conveying the property to Cohen and was at once recorded (Rec., pp. 18–20, 370).

Negotiations With Lessor For Compromise—(a) By Tenant as to the Forfeiture—(b) By Appellants as to the Tax Title.

Between the 2d and 8th of October, 1901, the complainant, through her son and counsel, endeavored to effect a compromise settlement with the lessor of the forfeiture incurred by which the forfeiture would be waived and the lease maintained, but without success (Rec., pp. 21, 179–80).

On the 9th of October the defendants Kann, through their counsel, informed the defendant Webb, as counsel for Mrs. Kennedy, of their ownership of the tax title in hostility to her, and offered to compromise the same and surrender the tax title if his client would give them possession of the property under a long lease, for which they would pay a net increase rental of $1,200 per annum over that fixed by the forfeited lease; that otherwise they would stand upon their legal rights under the tax title, which she must attack at her peril (Rec., pp. 291-2, 318, 372).

Webb submitted this proposition to Mrs. Kennedy and

she accepted it, which fact Webb communicated to counsel for the Kanns on the 10th of October (Rec., pp. 319, 320, 326, 373).

Nevertheless, the Kings, through their counsel, made further efforts, principally by correspondence with the defendant Webb, to effect a compromise of the forfeiture of the lease, beginning on the 12th of October (Rec., pp. 22–3) and extending to the 30th of October (Rec., pp. 22, 86–89, 294–5, 428–9). As shown by the correspondence itself, no basis of agreement was reached, and the matter culminated on November 1, 1901, in the withdrawal, by counsel for the Kings, of their previous proposition, the rejection of that tendered by defendant Webb, and their declination to enter into any compromise (Rec., pp. 89–91).

Lessor Brings Suit for Possession—Tenant Files This Suit to Enjoin.

On November 9th Mrs. Kennedy signed and duly executed, before Rutledge Wilson, a notary, the complaint, in a landlord and tenant proceeding, before a justice of the peace, against Caroline King for possession of the leased premises, which was duly filed by defendant Webb, and a summons issued the same day (Rec., pp. 24–5, 349, 353).

The trial of this proceeding was set for the 5th of December, 1901 (Rec., p. 10), and on the 4th of December, 1901, the original bill in this cause was filed by Caroline King against Mrs. Kennedy, the Kanns, and Cohen (Rec., p. 1), and a temporary restraining order issued (Rec., p. 25). On the same day Mrs. Kennedy died (Rec., p. 27), and on March 7, 1902, a bill of revivor was filed reviving the cause against her executor, the defendant Webb, and against Maria Gillis Dewey, alleged to be heir at law (Rec., pp. 26–29). On the 4th of April, 1902, a supplemental bill was filed (Rec., pp. 29–31).

The bill of revivor and the supplemental bill are merely

formal, to meet the requirements of equity practice, and involved no change in the case made by the original bill.

All the defendants answered and the cause came on for hearing on the pleadings, on complainant's motion for injunction *pendente lite*, and on June 28, 1902, an injunction *pendente lite* was granted against the defendant Webb (Rec., p. 106). From this order the defendant Webb appealed (Rec., p. 108), and said order was affirmed on January 20, 1903 (Rec., pp. 112-13). Thereafter the testimony of the parties was taken, and on June 30, 1904, the cause came on for hearing upon the pleadings and evidence, and the final decree was entered, from which separate appeals were prosecuted to the Court of Appeals of the District of Columbia (Rec., pp. 482-4), and upon affirmance there (Rec., p. 492) the separate appeals to this court were taken (Rec., p. 492).

Assignment of Errors.

1. The court erred in not dismissing the complainant's bills for want of equity in the case made by the pleadings and proof.

2. The court erred in relieving the complainant from the forfeiture of the lease incurred by her and in enjoining the defendant Webb, from recovering possession of the real estate in said lease described.

3. The court erred in not dismissing the complainant's bills because of multifariousness.

4. The court erred in decreeing that the tax sale of sublot A in square 432, and the deed conveying said lot to the defendant, Myer Cohen, were null and void, and in enjoining the defendants, Sigmund Kann, Louis Kann, and Myer Cohen, from setting up any title or claim to said lot by reason of said tax sale and deed.

5. The court erred in adjudging that half of the costs of this suit be paid by the defendants, Sigmund Kann, Louis Kann, and Myer Cohen, or any of them.

ARGUMENT.

Before entering upon the discussion of the questions of law and fact arising upon this record, a candid statement of the relation of these appellants to the controversy, as disclosed by the record, is due to the court and, it is believed, will be helpful to a correct understanding of the cause.

Relations of Appellants to the Controversy.

The appellants, Kann, are merchants conducting a large store on Market space, portions of which are in buildings on both sides of the building in controversy, which thus obstructs free communication between different portions of appellants' business properties and breaks the continuity of their front (Rec., pp. 358, 472). For these reasons they have long been desirous to secure possession of this property (Rec., pp. 371, 406–7), but, as the record conclusively shows, they took no steps to that end, and did no act hostile to the interests of lessor or lessee until after they had been informed by counsel for the lessor that the lease had been forfeited, that the tax sale had become irredeemable, that the lessee was to be evicted for breach of the lease, their own tenancy of the premises had been solicited, and the counsel for the lessor had himself declined to acquire the tax sale certificate (Rec., pp. 287–8, 305–6, 311–12, 322–4, 328–9, 360–1, 364).

Reflecting upon this situation, the appellant Cohen, acting as the counsel for his co-appellants, the Kanns, reached the opinion that the ownership of this tax title, without reference to whether it would draw to itself the legal title to the property or not, might nevertheless, in some way, not clearly defined in his own mind, aid his clients in securing possession of the property (Rec., pp. 361–2), and so he advised his clients to authorize the purchase (Rec., p. 362), which they accordingly did (Rec., p. 362).

This was a perfectly lawful act, as the tax sales certificates are made negotiable by the express words of the act of Congress authorizing their issuance.

(30 Stat., 251).

Notwithstanding his lawful right to purchase the tax sale certificate, the action of the appellant Cohen in doing so is made an essential ground for relief in the bill (Rec., pp. 5-6), and one of the bases for relief set forth in the opinions of the court below on the two appeals (Rec., 491, 501-2). And this, although the court in its opinion on the final hearing says (Rec., p. 491):

> "We find *no evidence whatever* in the record *of any fraud or wrong-doing* perpetrated by any one concerned. We only find the evidence of a situation created by a keen commercial rivalry and shrewd management, *wholly untainted by wrong-doing.*"

Having lawfully acquired the tax title in a manner "wholly untainted by wrong-doing," the only use they have ever attempted to make of it was to submit an offer of compromise, in which they agreed to surrender it to the lessor, without expense or litigation, though it is "*prima facie* evidence of a good and perfect title in fee simple," in consideration of a lease of the property at a rental of $1,200 per year more than the lessor was receiving under the forfeited lease (Rec., pp. 291–2, 318, 372).

The lessor was willing to compromise the tax title upon these terms (Rec., pp. 319-20, 326-373); but, by the decree in this cause, the execution of this compromise was prohibited, litigation of the tax title *with the tenant* at the risk of the *landlord* during more than four years compelled, and the tax title adjudged to be invalid.

Of course, these appellants are more directly and immediately injured by that portion of the decree which adjudges the invalidity of their tax title; but they are

equally, though indirectly, injured by the portion of the decree which relieves from and enjoins the forfeiture and prohibits the re-entry of the lessor, because thereby the lessor is prevented from giving a lease to appellants and carrying out the terms of the compromise. For these reasons they appeal from the entire decree.

Conditions Existing When Bill Was Filed.

At this point it seems advisable to invite the attention of the court to certain conditions actually existing at the time the bill was filed and to the admitted facts creating those conditions.

Without characterization or argumentative application, they may be tersely stated thus:

1. The lease demised the term upon the following, among other, express conditions:

> "Fifthly. Upon condition that the said party of the second part [the lessee], his executors, administrators, or assigns, will, during the continuance and until the end and determination of the said term for which the said premises are demised, *pay* or cause to be paid *in each and every year* thereof, *the taxes, general and special, of every character and description*, assessed against and levied upon the said premises by the authorities of the general or local government" (Rec., p. 14).

2. The bill admits and alleges, in the fifth paragraph, that—

> "The instalment of the taxes due upon the said property for the second half of the fiscal year ending June 30th, 1898, and payable in the month of May of that year, were overlooked and left unpaid" (Rec., p. 3).

3. The bill admits and alleges, in the sixth paragraph, that a sale of the property for this unpaid tax had been made to one Wiltsie on the 13th of April, 1899 [the

validity of which sale the bill denies], and that the same, if valid had become irredeemable by lapse of time (Rec., p. 3).

4. The bill admits and alleges in the seventh paragraph that as early as the month of July, 1901, the complainant was given the opportunity, by Wiltsie, to redeem the tax sale, notwithstanding the lapse of time, for a sum considered excessive by complainant, and which she declined, and that as late as September 24, 1901, he offered to allow her to redeem for $272.90, a sum less than double the amount of his outlay, which she also declined (Rec., pp. 3-4).

5. The bill admits and alleges in the eighth paragraph that on the 3d of October, 1901, the authorities of the District executed a tax deed, based upon said tax sale, to Myer Cohen, the assignee of said tax sale from Wiltsie and the said deed was recorded (Rec., pp. 6-7).

6. Section 3 of the act of Congress of February 28, 1898, the statute in force in this District at that time, provided for the execution of such a deed to the purchaser at the tax sale or to his assignee, and provided that such—

> "deed shall be admitted and held to be prima facie evidence of a good and perfect title in fee simple to any property bought at said sale" (30 Stat., 251).

7. On the 1st of October, 1901, the lessor wrote notifying the lessee of her election to forfeit the lease (Rec., p. 177), and on the 4th of the same month executed and had served upon the lessee a formal notice to quit (Rec., pp. 291, 349-50, 353, 474-5).

8. On the 9th of October, 1901, these appellants, through their counsel, offered to compromise the tax title with Mrs. Kennedy by surrendering the same, if she would give them a lease of the property upon an increased

rental (Rec., pp. 291-2, 318, 372), and she, acting under the advice of her counsel, and deeming the terms of compromise satisfactory, accepted the same (Rec., pp. 319-20, 326, 373).

9. The lease in question contains the stipulation that if the lessee or his assignee—

> "shall at any time or times refuse, neglect, *or fail* well and truly to observe, keep, and obey and perform *the aforesaid conditions and every of them* according to their or its true intent and meaning, then at the option or election of the said party of the first part [the lessor] the aforesaid term and every unexpired part thereof, shall instantly cease and determine (anything herein contained to the contrary notwithstanding), and be thereafter utterly null and void and of no effect; and it shall thereupon, at her option and election, be lawful for the said party of the first part into and upon the said demised premises, and into and upon every part thereof, wholly to re-enter and the same to have again, repossess and enjoy as in her first and former estate, as fully as though said demise had never been made" (Rec., p. 15).

10. On the 9th of November, 1901, the lessor, Mrs. Kennedy, instituted proceedings for possession in enforcement of the above provision of the lease (Rec., pp. 24–25).

11. On the 4th of December, 1901, the bill in this case was filed (Rec., p. 1), and upon the same day a temporary restraining order was issued, enjoining the lessor from prosecuting her proceeding for possession (Rec., 25).

So it appears that at the time the bill was filed the lessee had violated the condition of the lease by not paying the tax; that the property had been sold for taxes, and the sale, whether valid or invalid, had become irredeemable by lapse of time; that the lessee was offered a compromise of the tax sale, which she declined; that a tax deed had been executed conveying the land to a stranger, which deed, by law, is *prima facie* evidence of

a perfect title in fee; that a compromise of this tax title was then offered the lessor, which she considered advantageous and did accept; that the lease gave the right of re-entry for the lessee's default, and the lessor was exercising it when stopped by the injunction order.

The proposition in the bill, therefore, which the decree appealed from sustains, is, that the defaulting tenant, whose breach of covenant gave rise to the tax title can, on the suggestion of its invalidity, enjoin the landlord from extinguishing it by satisfactory compromise, and enjoin the forfeiture of the lease, while the tenant, for the preservation of her own estate, litigates the question of the tax title, at the peril of the landlord's title if unsuccessful, and wholly for her own advantage if successful.

I.

THE COMPLAINANT'S CASE IS WITHOUT EQUITY ON THE FACTS.

Inquiry Into Tax Title Irrelevant and Impertinent.

The basic problem in this case, whether the complainant is entitled to relief from the forfeiture incurred, is, of course, primarily, a question between the complainant and defendant Webb, but the relief sought against these appellants is not only incidental and subsidiary to, but ablutely dependent upon, the solution of that problem in complainant's favor. If, upon the case made by the pleadings and evidence, the complainant has not established such an equity as justifies relief from the forfeiture, then, manifestly, the complainant is entitled to no relief against these appellants because of having no property rights affected by their claim.

For this reason counsel for these appellants will endeavor to demonstrate to the court that complainant's

case, on the facts established by the evidence, is wholly without equity, that the allegations of the bill have not been supported, nor the negations of the answers met, and that the first and second errors assigned against the decree are well founded and should be sustained.

If this position of the appellants be correct, then all inquiry into the question of the validity of the tax title becomes irrelevant and impertinent, and the decree should be reversed and the cause remanded, with directions to enter a decree dismissing the bill, thus leaving the reversioner free to extinguish the tax title by purchase under the terms of compromise proposed to and attempted to be carried out by the parties when interrupted by the injunction. Proceeding, then, with the presentation of the complainant's case as made in the record, it is easily demonstrable that the case set up by the allegations of the bill is not established by the record, but, on the contrary, is shown to have had no existence in fact.

The Case as Made by the Pleadings and Proofs.

The bill proceeds upon the theory that the complainant had with great fidelity and diligence observed and performed all the obligations of the lease with a single exception, due to oversight and inadvertence under conditions of peculiar trial and distress; that when this single omission was discovered complainant set about its correction with proper diligence, but was cut off from its completion by the wrongful acquisition of the tax title by the Kanns, under an arrangement with the lessor by which they were to acquire it for the lessor's benefit and merely to obstruct and prevent the complainant's efforts to correct this single omission; that when the lessor correctly understood the situation she was willing to condone the forfeiture, but was prevented by the wrongful acts of the Kanns.

A comparison of these allegations of the bill with the evidence will show how entirely unsupported is this bill.

Allegations of Bill as to Cause of Default Disproved by Complainant's Evidence.

The first allegation in the bill of equitable ground for relief from the legal consequences of an admitted default is that the complainant had—

> "*fully and faithfully* complied with *each and every* of the terms of the said lease with the *single exception* that . . . the taxes due upon said property for the second half of the fiscal year ending June 30, 1898, and payable in the month of May of that year, were *overlooked* and left unpaid" (par. 5 of bill, Rec., p. 3).

The fact is, however, as shown by the evidence adduced in behalf of complainant, that her conduct had been the precise reverse of this allegation. With the single exception of the tax falling due in May, 1901, *default* was made in the payment of *every* instalment of tax falling due from the time of the acquisition of the lease down to the time of this controversy, and in consequence there were *two* sales for taxes of part of the property and one sale of another part (Rec., pp. 168–9, 170, 187–9, 279–284).

It is also alleged in the same paragraph that the pretended "*single*" omission to pay the taxes was occasioned—

> "wholly through oversight and inadvertence, and in part occasioned by the affliction and mental distress suffered by the complainant in consequence of the death of her said husband, added to the perplexity and distraction caused by the unfortunate condition in which his business affairs were found to be after his death" (Rec., p. 3).

The complainant, who makes these and the preceding allegations, in this positive form, under oath, did not testify in the cause, while the testimony of others adduced in her behalf shows them to be untrue.

She had no more to do with the lease or with the payment of taxes or the business of her husband's estate than a mere stranger (Rec., pp. 153-5, 184, 186-191, 195-6), and her son, who had entire charge of the matter, did not fail to pay this tax, or the others which were not paid, for the reasons stated, but failed to do so from sheer and wilful neglect or because it was pecuniarily inconvenient.

His testimony on the subject is as follows:

> Q. And you had it pointedly brought to your attention in December of 1897 that taxes had been due the preceding November that you were bound to pay and which had not been paid? A. Yes, sir.
>
> Q. When May came around what did you do? A. *I did not do anything. I had not charged my mind with it at all* (Rec., p. 187).
>
> Q. You knew you were to keep these taxes paid? A. Yes, sir.
>
> Q. You knew they were payable twice a year? A. Yes, sir.
>
> Q. When November, 1898, came around what did you do about these taxes? A. *I did not do anything for the same reason I stated before.*
>
> Q. When May, 1899, came around what did you do about these taxes? A. *Nothing, for the same reason.*
>
> Q. When November, 1899, came around what did you do about these taxes? A. *Nothing.*
>
> Q. When May, 1900, came around what did you do about these taxes? A. *Nothing at all* (Rec., p. 188).

Can such testimony as this support the above quoted allegations of the bill?

Nor is this all. The wilful disregard of the covenant

of the lease and of the rights of the owner, and that the failure to pay was not "wholly through oversight and inadvertence," is strikingly shown by the conduct of the Kings after Wiltsie called on them, in July, 1901, to redeem the tax sale. In that *first* letter Wiltsie says:

> "I am *now entitled to a deed* to the property; but I will *surrender the tax certificate without obtaining a deed* if you will give this matter immediate attention. *Delay will be entirely at your own risk*" (Rec., p. 285).

In a postscript, Wiltsie adds:

> "I am informed that you are interested in the premises as owner or mortgagee. If I am wrongly informed, I shall esteem it a favor if you will kindly state that fact and *give me the name and address of some interested party*" (Rec., p. 285).

The amount which Wiltsie claimed for redemption of this irredeemable sale was only $100.10 in excess of what it would have cost had the tax sale been redeemable. Instead of paying it and redeeming, as he had done in the cases of his own property from this same Wiltsie (Rec., pp. 183–4, 192–3), he consulted his counsel, Mr. Tobriner, and was advised that that gentleman's opinion was that the tax sale was irregular and could be set aside (Rec., pp. 172, 184), but in such a proceeding that *Mrs. Kennedy must be a party or the use of her name permitted* (Rec., pp. 11, 21).

He did not inform Wiltsie who the owner was, nor that the sale was irregular, nor did he inform Mrs. Kennedy and give her the opportunity to protect herself. He wilfully concealed the facts from her while he chaffered with Wiltsie over a difference of $25 for over two months (Rec., pp. 285, 273, 174–5, 55, 175–6, 179).

Can this be called oversight and inadvertence? And how does it compare with the conduct of the defendant

Kann, who, though he owed no duty to any one in the premises, the instant he was informed by Knight of the fact of the tax sale, sent Knight to the defendant Webb, the counsel of Mrs. Kennedy? (Rec., pp. 65, 447–8.)

It is respectfully submitted that the averments of the fifth paragraph are wholly unsupported by evidence; that the complainant who makes them, but failed to testify, is shown by the evidence in her behalf to have been wholly ignorant of any of the facts stated in it, while the witness called in her behalf to prove the averments has shown them to be wholly unfounded.

Appellants' Acquisition of Tax Title Not Wrongful or Inequitable.

The tax sale certificate was purchased by Cohen from Wiltsie, and a tax title taken in his own name, but the money was furnished by the Kanns, in whose interest and for whose use and benefit it was acquired by him as their counsel (Rec., p. 5).

The allegations of the bill as to this transaction are that—

> "the said Cohen then called upon the said Webb to inform him that he was going on to Rochester to buy the tax title from the said Wiltsie, . . . his said action in so doing being *entirely acquiesced in* by the said Webb, *acting on behalf of the said Kennedy*" (par. 8 of bill, Rec., p. 5).

And again, in the same paragraph—

> "that it *never was contemplated* upon the part of *either the defendant Marianne A. B. Kennedy* or the defendants *Kann* that the said tax certificate should be purchased *for the purpose of using the same adversely to her*, or in any manner to endanger her title to the very valuable property in question; that *an agreement or understanding*, whether expressed or tacit, *existed between them*

that the said tax title should be used *only* in furtherance of the common design to have the complainant's lease forfeited," etc. (Rec., p. 6).

Before proceeding with an analysis of these allegations it is important to recapitulate the facts as they existed at the time to which the allegations refer.

The information by Cohen to Webb, of Cohen's purpose to purchase the tax sale certificate, was given to Webb at 6 o'clock p. m., on September 30, 1901 (Rec., pp. 228, 312, 324, 364).

Ever since the receipt of Wiltsie's letter of July 24, 1901, the complainant had had the opportunity to redeem the tax sale or to notify Mrs. Kennedy of the facts and give her the opportunity to redeem it or to institute proceedings for its contestation; and from the 25th of September, 1901, till the close of banking hours on October 1, 1901, the certificate was in Washington at a bank subject to redemption by the complainant (Rec., pp. 175–6, 254, 368). Of these facts only the Kings were cognizant, none of the defendants having any knowledge thereof (Rec., pp. 47, 61, 368–9, 254, 80–81, 332).

The allegation of the bill, therefore, is, that in this situation, on the evening of September 30, 1901, the lessor, Mrs. Kennedy, through her counsel, Webb, "entirely acquiesced in" Cohen's purchase of the tax title, because "an agreement or understanding" at that time "existed between them," that the tax title, when acquired, should not be used "adversely to her" but "should be used *only* in furtherance of the common design to have the complainant's lease forfeited."

These averments of the bill are categorically denied in the answers of all the defendants (Rec., pp. 45, 46, 67, 68, 80, 81).

It is also shown that the Kanns had no communication with Mrs. Kennedy or any one representing her, and that their counsel had no communication with her or any one

representing her except her counsel Webb (Rec., pp. 323, 325, 326, 352, 370).

It is sufficient, therefore, to refer to the language of the answers of Cohen and Webb to see how squarely the issue was made upon these averments. The defendant Cohen, in his answer, says:

> "The statement in said paragraph that the said Webb, acting in behalf of Mrs. Kennedy, entirely acquiesced in the course of this defendant *is false. The said Webb did not acquiesce in the course of this defendant, but expressly dissented therefrom*" (Rec., p. 45).
>
> "*And this defendant avers that no such agreement or understanding, expressed or tacit,* or anything approaching such an agreement, or which the said Webb or the said Mrs. Kennedy or any other person could by any possibility have supposed or believed constituted or implied any such agreement *ever at any time existed*" (Rec., p. 46).

The defendant Webb, in his answer, says:

> "The statement in said paragraph that this defendant entirely acquiesced in the project and course of said Cohen is *utterly false.* This defendant never, at any time or in any way, acquiesced therein, and so far as he said or did anything with respect thereto he objected to and opposed said Cohen's purpose" (Rec., p. 80).

As to the allegation that an agreement or understanding, expressed or tacit, as to the use to be made of the tax title existed, he further says that it—

> "is *an absolute and unmitigated falsehood, without any shadow of foundation in fact, and that no agreement, arrangement, or understanding, expressed or tacit, or otherwise, of any sort or description, ever existed* between this defendant or his client, Mrs. Kennedy, and any person whomsoever, *with respect to the acquisition and use of said tax certificate,* and each and every

averment, insinuation, or suggestion in the bill of complaint to the effect that any such agreement existed *is false*" (Rec., p. 81).

It may be said that the language of these several denials is more forcible than elegant, but it is submitted that the nature of the accusations which they repelled fully justified, if it did not actually require, the indignant characterization of the accusation, as well as the comprehensive and unqualified denial of its truth.

The only testimony in the record in anywise relevant to the issue made by these allegations of the bill and the denials in the answer is that of the defendants, Cohen and Webb, who, in that testimony, utterly deny the truth of these allegations of the bill (Rec., pp. 288, 302, 312, 313-15, 324-5, 361, 364-5).

The cross-examination of these two defendants, according to the appreciation of counsel for these appellants, appears to involve rather their skill and ability as lawyers, from the standpoint of adverse counsel, and of the accuracy and wisdom of their judgments as to situations presented to them affecting the interests in their respective charges, than as tending to impeach the correctness of their statements of fact, or to elicit any facts not stated by them in their direct examination.

Counsel for these appellants forbears to comment further upon it than to suggest, without intending offense and with all due deference, that unless they were to be impeached as false witnesses most of this cross-examination might well have been omitted, since the court is not concerned with, nor has jurisdiction to pass upon the relative skill, learning, and discretion of counsel for parties in a matter affecting the private rights of property of their respective clients.

But even if the purpose of this cross-examination was to impeach the veracity of the defendants, Cohen and Webb, it is respectfully submitted that there is nothing

in the record which has that effect, that the denials in the answer have not been overcome by proof, and that there is not a scintilla of evidence in the entire record having any tendency to give even *prima facie* support to these allegations of the bill.

There having been, therefore, no understanding or agreement between the lessor, Mrs. Kennedy, either directly or through her counsel Webb, by which Cohen acquired ownership of the tax sale certificate, and it being shown to have been Cohen's independent act, for his own purposes, it is difficult to conceive upon what hypothesis the rightfulness of his purchase can be assailed.

By the terms of the statute authorizing the issuance of the tax sale certificate, the certificate is made assignable without restriction.

The law provides that—

> "Upon the payment of the purchase money the said collector of taxes shall issue to the purchaser a certificate of sale, and if the property shall not be redeemed by the owner or owners thereof within two years from the last day of sale, by payment to the collector of taxes of said District, for the use of the legal holder of the certificate, the amount for which it was sold at such sale and fifteen per centum per annum thereon a deed shall be given by the Commissioners of the District or their successors in office to the purchaser at such tax sale, his heirs or devisees, *or to the assignee of such certificates*, which deed shall be admitted and held to be *prima facie* evidence of a *good and perfect title in fee simple* to any property bought at said sale herein authorized."
>
> Sec. 3, Act of February 28, 1898, 30 Stat., 251.

By the express terms of the statute, the original purchaser may assign the certificate to whom he pleases, and the assignee of the certificate is then entitled to a deed.

To deny such right in the assignee is to repeal the statute and to destroy the obligation of the contract between the District and the purchaser.

The bill of complaint does not deny this plain provision of law, but in the allegations under consideration, in effect, alleges that the purchase by Cohen, being made under the alleged agreement with Mrs. Kennedy, is in legal effect a purchase by her. This, as has been shown, is met by the denials of the answer and not attempted to be supported by evidence.

Charge of Threats, Menaces, Duress, and Undue Influence Practiced by Appellants Unsupported and Disproved.

The next ground of equitable relief alleged in the bill is that the defendant Kennedy desired to waive the forfeiture of the lease, but was prevented from so doing by the wrongful acts of the defendants Kann, who by threats and menaces compelled her to enforce the forfeiture of the lease against her will.

Before entering upon the consideration of the averments of the bill and answers and of the testimony pertinent to this branch of the case, the attention of the court should be recalled to the precedent allegations of the bill constituting the second ground for equitable relief.

By those allegations it is claimed that the original acquisition of the tax title by the Kanns was "*entirely acquiesced in* by the said Webb, *acting on behalf of the said Kennedy*" (Rec., p. 5), in pursuance of "an *agreement* or *understanding*" (Rec., p. 6), which "*existed between them*" (Rec., p. 6), that the Kanns should buy the tax title and that the same "should be used only in furtherance of the common design to have the complainant's lease forfeited" (Rec., p. 6).

Thus the bill alleges two utterly inconsistent and

irreconcilable grounds of relief, namely, that the tax title was acquired in pursuance of an *agreement* to *aid* Mrs. Kennedy in her *voluntary enforcement* of the forfeiture, and also as a *threat* to *compel* her to enforce the forfeiture *against her will.*

In the light of this situation the attention of the court is invited to the allegations and proofs on this third ground of equitable relief, the alleged duress practiced upon the defendant Kennedy.

The twelfth paragraph of the bill is as follows:

> "Thereafter, the defendant, Marianne A. B. Kennedy, becoming more fully informed or advised as to the transaction, was unwilling to proceed further with it; and, *through Doctor Henry D. Fry*, a relative with whom she had consulted about the matter, *she informed this complainant* that she did not consider it desirable or proper to insist upon the forfeiture, and that she was willing to waive the same and to permit the complainant to continue under the terms of the lease, if such arrangement could be affected" (Rec., p. 9).

The answers all put the complainant to proof of this extraordinary averment. The answer of Cohen says:

> "This defendant has no personal knowledge of the facts set forth in the twelfth paragraph of said bill, but he is informed and believes, and therefore avers, that *the said averments of facts are untrue*" (Rec., p. 49).

The defendants Kann in their answer deny all personal knowledge of the averments in this paragraph, and if material demand proof thereof, and add that they are—

> "Informed and believe that *said Dr. Henry D. Fry has unequivocally denied to counsel that he ever made any communication to the complainant of any sort whatsoever with respect to this matter*" (Rec., p. 70).

The answer of the defendant Webb categorically denies the allegations of this paragraph (Rec., 82-3), and adds:

> "This defendant has no personal knowledge of what the said Dr. Fry may have represented to the complainant, but *he is informed by the said Dr. Fry* that he, said Fry, *never informed the complainant anything*, and he was informed *by the said Mrs. Kennedy that she never authorized the said Fry, or any one else, to make any such representations*" (Rec., p. 83).

It is to be observed that the allegations in this twelfth paragraph of the bill are not made upon information and belief, but are positive declarations by the complainant under oath, and the alleged communication from Dr. Fry is not claimed to have been made to her counsel or other intermediary, but directly to herself, the language being that "Marianne A. B. Kennedy, through Dr. Fry, informed *this complainant*," etc. (Rec. p. 9), and after the answers were filed no attempt was made to amend the bill in this or any particular.

The precise date of this alleged occurrence is not stated in the bill, but as the paragraph is introduced by the word "thereafter," and the precedent allegations deal with events between the 8th and 14th of October, 1901, it could not refer to any time anterior to the 14th of October. There is other evidence in the record showing that it could not have occurred prior to the 26th of October.

It appears from the testimony of defendant Webb that on the 15th of October, 1901, Mr. Tobriner, counsel for complainant, called upon defendant Webb, as counsel for Mrs. Kennedy, saying that he would like to have a letter from Mrs. Kennedy to Mrs. King waiving the necessity for a tender of rent (Rec., p. 292). With reference to this Webb says:

> "I told him that it would not be necessary to have such a letter written; that the Kings could send the check, as they had before, and it would

> be returned. He said no; he would not do that; that *he proposed to make a personal tender of the money;* and after some conversation I think I told him I would have the letter written" (Rec., p. 292).

This demand for a letter from Mrs. Kennedy direct to Mrs. King was repeated by Mr. Tobriner in a letter of October 17 (Rec., p. 86), and again in a letter of October 22 (Rec., p. 86).

On the 22d Mrs. Kennedy wrote to Mrs. King, as requested, saying:

> "My counsel, Mr. Webb, informs me that your counsel, Mr. Tobriner, wishes me to write to you directly, stating whether, in the event of your tendering rent to me for the premises, No. 715 Market space, I will accept the same.
>
> "I have, therefore, to say to you, I would not accept the money if offered, as *I do not wish in any way to waive or qualify my notice terminating the tenancy of the premises.*
>
> "By Mr. Tobriner's request I send this to you through that gentleman.
>
> "I am very truly yours,
>
> "MARIANNE A. B. KENNEDY."
>
> (Rec., p. 87.)

Webb also testifies as follows:

> Q. Mr. Webb, what was Mrs. Kennedy's first attitude with respect to the forfeiture of this lease? A. Her first attitude was to enforce the forfeiture of the lease, and *there was no change in her attitude, to my knowledge, until the 26th day of October, 1901* (Rec., p. 431).

There is no evidence that at this time Mrs. Kennedy had become "more fully informed or advised," as alleged in the bill, and the only evidence bearing upon the subject is that Dr. Fry had made certain representations to her which impressed her and led her to a temporary

change of purpose (Rec., pp. 426-427), after which she returned to her original attitude (Rec., pp. 431, 432-450).

Mrs. Kennedy died the same day the bill was filed, and, of course, neither side could take her testimony; but Dr. Fry and the complainant, *the only parties to this alleged transaction, were both in life, and neither was called as a witness* to prove the allegations of this twelfth paragraph.

Among the affidavits filed in the cause for use on the hearing for an injunction *pendente lite* is one by said Dr. Fry (Rec., pp. 103-105), a portion of which is as follows:

> "This affiant *never assumed to represent Mrs. Kennedy as her agent* or to interfere with or control Mr. Webb's advice or his conduct of Mrs. Kennedy's affairs as counsel. This affiant *never had any communication whatever with the complainant, Mrs. King, and never informed her, or any one for her, that Mrs. Kennedy did not consider it proper to insist upon the forfeiture of the lease or that she was willing to waive the forfeiture and permit Mrs. King to continue under the lease. This affiant was never authorized by Mrs. Kennedy to make any such representation to any person*" (Rec., p. 105).

Of course this *ex parte* affidavit is not competent evidence against complainant of the facts stated in it, but the complainant's failure to call Dr. Fry is competent evidence that his testimony, if taken, would have been adverse. The record, therefore, shows that complainant failed to support the allegations of the twelfth paragraph by the evidence of the only two witnesses who could support it, and also shows that one of those witnesses has made a directly contradictory statement, under oath, in this proceeding.

In the thirteenth paragraph of the bill it is alleged that Dr. Fry—

> "*acting as a representative of the defendant,*

Marianne A. B. Kennedy, and at her instance and request, stated to the defendant Cohen, and to additional counsel employed on behalf of the defendants Kann, *the attitude of the defendant Marianne A. B. Kennedy in the matter,* and *her* wish to withdraw from the present scheme of enforcing the forfeiture and of dispossessing the complainant under the circumstances, in favor of the defendants Kann; whereupon the said defendants Kann, through their said counsel, replied that the defendant Marianne A. B. Kennedy must take her choice between fighting the complainant by insisting upon the forfeiture and pursuing the requisite proceeding for dispossessing her, or else that she must fight the defendants Kann for the title to her property, which might be wholly lost to her through their tax deed" (Rec., p. 9).

The correctness of these allegations is put in issue by all the answers (Rec., pp. 49, 70, 83).

The answer of the defendant Cohen says:

"Answering the thirteenth paragraph of said bill, this defendant says that the averments of fact therein contained are untrue; that the said Dr. Fry *was not the representative of Mrs. Kennedy and did not claim to be so to this defendant or to counsel for the defendants Kann in the interview referred to, but on the contrary expressly disclaimed being her representative or having any authority to speak for her or to interfere with the management of her case in the hands of her counsel, Mr. Webb,* and that on said occasion he did not undertake to explain the attitude, wishes, or desires of the said Mrs. Kennedy, but *merely expressed his own views,* which were that his patient was liable to be seriously affected in her health if litigation should ensue, and that he wished to avoid litigation in the premises. . . . Said Dr. Fry was then informed that litigation was inevitable because if the said Mrs. Kennedy did not compromise the tax title with the defendant Cohen, litigation would ensue thereon through

which she might lose her entire estate, and that in order to effect the compromise with said Cohen, it was necessary to enforce a forfeiture of the lease of the complainant" (Rec., p. 49).

The defendant Webb answers thus:

"Answering the thirteenth paragraph of said bill, this defendant denies the facts therein stated and demands strict proof thereof, but he is advised and believes and therefore avers that the same are immaterial to the proceedings in this cause" (Rec., p. 83).

The fourteenth paragraph of the bill alleges that—

"Thereafter, to wit, on the ninth day of November, A. D. 1901, the defendant, Marianne A. B. Kennedy, *under the pressure and menace thus brought to bear upon her*, instituted a landlord and tenant proceeding against the complainant for the possession of the said premises" (Rec., p. 9).

The answers of all the defendants deny this allegation (Rec., pp. 50, 70-71, 83), the defendant Webb, who must certainly have been fully informed of the matter, saying in his answer:

"That she brought the said proceeding *voluntarily* and without coercion, threats, or menaces from any person whomsoever, and that in doing so *she acted under the advice of her counsel and of her friend and physician, Dr. Fry, in whose presence alone she signed the said complaint and to whom she delivered it for delivery to her counsel, this defendant*" (Rec., p. 83).

The substance of these allegations of the thirteenth and fourteenth paragraphs of the bill is this: That Dr. Fry, *acting as a representative* of the defendant, Marianne A. B. Kennedy, and *at her instance and request* informed

counsel for defendants Kann of Mrs. Kennedy's change of purpose; that counsel for Kanns then threatened litigation over the tax title, involving the title to the property, and that, "*under the pressure and menace thus* brought to bear upon her," i. e., by the threats of the Kanns' counsel, not made to her, but made to Dr. Fry, she instituted the landlord and tenant proceeding for possession.

Before considering the evidence pertinent to this part of complainant's case, it is important to notice a fatal omission in the allegations themselves.

It is nowhere averred that this alleged transaction was made known to Mrs. Kennedy in any way, but the alleged duress is confined to a statement made to Dr. Fry, but not alleged to have been communicated to her.

The record shows that there were present on the occasion in question four persons, Dr. Fry, the defendant Webb, the defendant Cohen, and the counsel who signs this brief (Rec., pp. 427, 430). Only two of those persons were sworn as witnesses in the case, the defendants Webb and Cohen. Neither of them testifies that Mrs. Kennedy ever knew that the conference with Dr. Fry had ever taken place, and neither was even asked if Mrs. Kennedy was informed of its occurrence. The whole contention of the bill as to this matter of duress over Mrs. Kennedy rests upon an alleged occurrence *out of her presence, and never brought to her knowledge.* No inference of knowledge on her part can be deduced from the allegation that Dr. Fry, on the occasion in question, was "acting as a representative" of Mrs. Kennedy "at her instance and request" because no attempt was made to prove either of those allegations.

But even had Dr. Fry occupied the relations ascribed to him in the bill, and even had the alleged occurrence been reported to Mrs. Kennedy, the proof shows that it did not have the effect of "pressure or menace," but that

her *subsequent action was hostile to the Kanns and favorable to the Kings.*

The alleged conference took place on the 29th of October (Rec., pp. 427, 430) [not 30th, as alleged in the bill], and, later that day, Webb had a conference with Mrs. Kennedy in which he suggested his purpose to relinquish his position as her counsel, but she urged him to continue to act for her, and, as a result of that conference, he sent a proposition of compromise to counsel for complainant (Rec., p. 431). This proposition, it will be seen, was to waive the breaches of covenant in the lease and forego the forfeiture upon certain conditions for the protection of the lessor, among them that the complainant would, *by judicial proceedings against the Kanns and Cohen, have the tax deed finally adjudicated to be null and void* (Rec., pp. 87, 88, 89).

This proposition was declined by complainant, and all negotiations for compromise ended by a letter from her counsel of November 1, 1901 (Rec., pp. 89-91, 431), and it was not until eight days later, and after Dr. Fry had satisfied himself that the Kings had finally rejected the compromise and that there was no chance of a compromise with the Kings, that the complaint in the landlord and tenant proceeding was executed by Mrs. Kennedy (Rec., p. 431-2). It was signed by her and delivered to Dr. Fry, by whom it was delivered to Webb on November 9, 1901 (Rec., p. 353).

Thus it is seen that this action of Mrs. Kennedy was not in consequence of the "pressure and menace" alleged in the bill, but was the direct consequence of the complainant's final rejection of her offer of compromise and refusal to enter into any compromise with Mrs. Kennedy.

A further important fact to be considered in connection with this interview between the counsel for the Kanns and Dr. Fry is the circumstance of its occurrence. Neither the Kanns nor their counsel sought Dr. Fry or

attempted through him to control the action of Mrs. Kennedy. On the contrary, that interview was brought about at the instance of Dr. Fry and by the express invitation of Mr. Webb, Mrs. Kennedy's counsel (Rec., p. 430). Under such conditions counsel for the Kanns had a clear right to state their position as to the existing controversy.

The bill also alleges something in the nature of a compulsory agreement between the defendants for the enforcement of the forfeiture by Mrs. Kennedy. The ninth paragraph of the bill alleges, upon information and belief, that the defendants now—

> "claim that an agreement existed between them to the effect that if the defendant Kennedy will, by all means in her power, enforce the said forfeiture, and if she succeeds therein, lease the said premises to said defendants Kann, the latter will not seek to enforce the tax title against her, but that if she shall not so insist upon the said forfeiture, then the defendants Kann will set up an adverse title against her" (Rec., p. 7).

The answers of the defendants all deny that such an agreement now exists or ever existed, or that they ever so claimed (Rec., pp. 48, 69, 82).

The answer of the defendants Kann avers that on the 9th of October, 1901, their counsel informed defendant Webb that the tax title would be asserted and enforced against Mrs. Kennedy unless she would give them possession under a long lease at an agreed rental, which was the only condition on which they would compromise their claim of right to the property in fee, and unless she would give such a lease she must defend against the tax deed at her peril. And the answer adds that—

> "These defendants are now at liberty to enforce said tax title, and the defendant Webb is at liberty to resist the same or to institute proceedings for

> the defeat of said tax title as he may be advised; and that there has never been a time when these defendants and the said Kennedy and Webb were not at liberty to proceed each against the other as aforesaid" (Rec., p. 69).

The only testimony in the record which has any bearing upon this branch of the case is that of the defendants, Webb and Cohen, no other witness having testified or been interrogated with respect thereto.

The substance of that testimony is that on the 9th of October, 1901, the counsel who signs this brief was retained by the Kanns (Rec., p. 372); that the whole matter was committed to his control, and that his suggestions and advice were followed (Rec., pp. 409–410); that said counsel thereupon called upon defendant Webb, and in substance informed him of the fact that the tax title was owned by the Kanns; that they would not sell or release it; that in his opinion it was valid and enforceable; that under the statute it was *prima facie* evidence of a good title, and that in a judicial proceeding to defeat it the burden would be on Webb's client to show its invalidity and defeat it; that to contest the tax title would involve his client in litigation, delay, and expense.

Said counsel also stated to said Webb that if his client would give the Kanns a long lease on the property the Kanns would surrender the tax title without contest and without expense to her and pay $300 per month for the property and the taxes thereon; that if Mrs. Kennedy would not accept this proposition the Kanns would insist upon their tax title, and, if litigation ensued and the tax title was sustained, would enforce it against her fee simple title to the property (Rec., pp. 372, 410, 413, 415, 291–2, 318, 319, 320, 321).

From the allegations of the bill and the tenor of the cross-examination of the defendants Cohen and Webb on this subject, it would seem that complainant's counsel

regard this transaction as reprehensible and as being, in some undefined way, an unlawful invasion of the rights of the complainant and the defendant Kennedy, and as placing Mrs Kennedy under duress and compelling her to evict the Kings against her wish.

It is submitted that there was not the slightest impropriety in any of this communication to Webb, and that the same was in all respects a proper and liberal offer of compromise of an impending litigation.

The prominence given to this transaction in the bill and cross-examination of Webb and Cohen justifies its detailed analysis.

The facts of the tax sale and that it was irredeemable and that a tax deed had been executed and recorded were already known to Webb, and there was certainly no impropriety in informing him that the Kanns were the real owners of it. The expression of his opinion as to the validity of the tax title by counsel for these appellants to Webb was but the expression by one lawyer to another of his opinion upon a question of law, which could bind nobody, and as to which Webb was as competent to form an opinion as was the counsel for these appellants. The statement that the tax deed was *prima facie* evidence of a good title in fee was but calling his attention to the language of the statute, while the statement that in a judicial contest of it the burden would be upon Webb's client to show the invalidity of the tax deed, and that litigation over it would involve delay and expense, were but calling his attention to obvious and undeniable elements of the litigation. The statement that in the event that litigation over the tax title should ensue, the Kanns would, if successful, insist upon their title, was nothing more than a declaration that in such a litigation the parties must abide by the judgment —an inevitable consequence of the law—with respect to which no sane person had the right to entertain a contrary expectation.

The tax deed was an actuality of *prima facie* validity, which could only be avoided by voluntary surrender, successful litigation, or by compromise. Under such circumstances counsel for these appellants knows of no principle of law or morals which precluded these appellants from offering a compromise in all respects favorable to their opponent.

In this connection it is important to observe the actual situation of affairs *before* the interview between Webb and the counsel of these appellants took place.

Mrs. Kennedy had, eight days before, in her letter of October 1, refused the rent and notified complainant of her intention to forfeit the lease (Rec., p. 177); five days before, on the 4th of October, she had taken the further legal steps of signing and having served a formal notice to quit (Rec., pp. 349, 350, 474–5), and the complainant had *threatened litigation both as to the forfeiture and as to the tax title, and had also sought to effect a compromise of both*, as shown by complainant's evidence. Thus, Harry King, in his testimony, states that upon receiving Mrs. Kennedy's letter returning the rent and asserting the forfeiture on the 2d of October he called upon Webb (Rec., p. 179); that he told Webb—

> "in that conversation that I wanted him to understand *that we would not waive any of our rights with reference to the lease.* . . . I again told him *there would be no waiving of our rights in the matter of a lease and that we did not propose to consider it a forfeiture.* . . . *I went up to see Mrs. Kennedy* and she denied herself to me on the plea of not being well. Then I came down to see Mr. Tobriner and I told Mr. Tobriner. . . . *I went to see Mr. Tobriner and laid the matter before him*" (Rec., p. 180).

Mr. Tobriner, counsel for complainant, testifies that on the 3d of October, 1901, he conferred with Webb as Mrs. Kennedy's counsel, both on the subject of the tax sale

and of the forfeiture of the lease (Rec., pp. 236–237). Mr. Tobriner states that on that occasion—

> "*I discussed the relationship that had existed between the Kings and Mrs. Kennedy. He told me, however, that Mrs. Kennedy had decided to insist upon a forfeiture of the lease,* and that Mrs. Kennedy might make a new lease to the Kings, but that it would have to be at a greater rental" (Rec., p. 237).

Mr. Tobriner also testifies that on the morning of the 4th of October, 1901, he learned of the record of the tax deed, and thereupon called upon Cohen (Rec., pp. 237-8), and in that interview attempted to effect a compromise with Cohen in behalf of the Kings by which Cohen would surrender the tax title (Rec., pp. 238-9). He further states that in that conversation he told Cohen—

> "that the Kings *would insist upon remaining in possession of the premises and standing on their lease.* I also said to him when I first went there that of course whatever I said to him and whatever he said to me I would use, because *there would in all probability be litigation in the matter*" (Rec., p. 239).

On the 8th of October, 1901, counsel for complainant addressed and sent, directly to Mrs. Kennedy, a letter in which, among other things, they say:

> "We have advised Mrs. King that the sale of the premises for taxes is void. . . .
>
> "*For the purpose of canceling the alleged tax sale* and complying with the conditions of the lease, *Mrs. King asks permission to use your name in instituting and conducting legal proceedings to that end,* hereby offering to pay all costs of such proceedings and to indemnify and protect you by proper bond or undertaking against any liability or loss in the premises.

"Will you be kind enough to advise us by Saturday, the 12th inst., what you will do in the matter" (Rec., p. 21).

Thus it is that on the 2d of October King saw Webb, as Mrs. Kennedy's counsel, sought to effect a compromise, and threatened litigation over the lease, and then attempted to see Mrs. Kennedy for the purpose of a compromise; that on the 3d of October complainant's counsel, Mr. Tobriner, saw Webb and endeavored to compromise the lease matter, and on the 4th saw Cohen and endeavored to compromise the tax title matter, threatening litigation as to both the lease and the tax title, while on the 8th of October counsel for complainant communicated directly with Mrs. Kennedy in writing, seeking to effect a compromise of the forfeiture of the lease, and also seeking her consent to the institution of litigation in her name against these appellants to defeat the tax title. On the 5th of October the Kings sent their agent Cahill to defendant Webb to endeavor to effect a compromise through the medium of a new lease (Rec., p. 291), and negotiations between them were actually progressing to that end up to the 9th of October, 1901 (Rec., pp. 291, 317, 325).

The complainant, through her counsel and agent, not only saw counsel for Mrs. Kennedy and the Kanns, threatening them with litigation and making overtures of compromise, but, thereafter, through counsel, communicated, by letter, directly with defendant Webb's client, Mrs. Kennedy, for the same purpose.

These acts of complainant's counsel are not referred to in criticism, but merely to call to the attention of the court the fact that complainant went much further in attempting to control Mrs. Kennedy's conduct than is alleged against defendants Kann; yet the complainant, in the bill, treats these several acts, done by counsel in her behalf, as the proper pursuit of a lawful right.

The sixteenth paragraph of the bill, however, complains that the acts of these appellants prevented the defendant Kennedy—

> "from waiving the said contract forfeiture and *allowing her and the complainant to adjust the matter amicably without resort to the courts*" (Rec., p. 12).

Upon what principle of law is it that the complainant has an exclusive right to threaten litigation and make overtures of compromise? Had not the defendant Kennedy as much right to "adjust amicably" the matter of the tax title with the Kanns, "without recourse to the courts" as she had with respect to the Kings and the forfeiture of the lease?

The lease of the complainant is, by the admissions of the bill and this resort to equity, forfeited and at an end at law, and could only be revived and sustained by voluntary waiver or recourse to litigation; the tax title of the Kanns is, by statute, *prima facie* valid at law and could only be defeated by voluntary surrender or recourse to litigation. Both were hostile claims, against Mrs. Kennedy, and both founded in and arising solely through the wilful and persistent default of the complainant.

The Kanns owed no duty to the complainant, nor to the defendant Kennedy. They are mere purchasers of a tax sale certificate, arising through complainant's default, and made assignable at law. They had as much right to stand on their tax title or to compromise it as the complainant had to stand on the lease or compromise the forfeiture, and the contention that the action of their counsel in submitting a proposition of compromise with an alternative of litigation to Mrs. Kennedy's counsel was in any respect unlawful or improper is baseless.

Moreover, the evidence conclusively shows that the

proposition made by the counsel for these appellants to the defendant Webb did not operate as a menace or duress upon Mrs. Kennedy. None of these defendants or their counsel communicated or attempted to communicate with Mrs. Kennedy directly, but, on the contrary, carefully confined their conduct to communications by their counsel to the counsel of Mrs. Kennedy (Rec., pp. 323, 325, 326, 352, 370), while the single interview with Dr. Fry, so far as these appellants and their counsel are concerned, was not at their solicitation, but at the instance and invitation of her counsel, Mr. Webb (Rec., pp. 430, 433, 438).

The fact that Mrs. Kennedy had the benefit of the intervention of her own counsel between these appellants and their counsel at all times, and that no attempt was ever made to evade his intervention or to treat or communicate with her directly, would seem a sufficient answer to the suggestion of duress, but there is other evidence in the record which conclusively shows that no duress was accomplished.

The conference between counsel for these appellants and Webb occurred on the 9th of October, 1901, yet *after* that date Webb was in negotiation with the representatives of complainant with a view to compromising with her. Thus, Mr. Tobriner, in his letter of October 22, 1901, says:

> "You also at that time *spoke about the terms of a new lease from Mrs. Kennedy to Mrs. King, and you then said you would also let me know the terms on which Mrs. Kennedy would execute such new lease, assuming that Mrs. King would surrender the old one*" (Rec., p. 86).

Mr. Tobriner had had an interview with Mr. Webb certainly as late as October 15 (Rec., pp. 240, 292).

Thereafter, on October 30, Webb sent a proposition of compromise to the counsel for complainant (Rec., pp. 87-

89) which involved the waiver of the forfeiture, *the complainant's continued possession, and the institution of litigation against these appellants to have their tax title decreed to be invalid* (Rec., pp. 87-89), and this was voluntarily rejected by complainant's counsel in their letter of November 1, 1901, and all terms of compromise definitively declined because, as specifically stated in the letter, of alleged misconduct on the part of Mrs. Kennedy through her counsel (Rec., pp. 89-91).

It is, therefore, conclusively shown by the uncontradicted and only evidence relevant to this feature of the case, that the allegation of the bill that the tax title was—

> "being used as a menace to the defendant Marianne A. B. Kennedy to prevent her from waiving the said contract forfeiture and allowing her and the complainant to adjust the matter amicably without resort to the courts" (Rec., p. 12),

is untrue, and that, on the contrary, negotiations for a compromise between them progressed both before and after the 3d of October and up to November 1, 1901, *without ever reaching an agreement as to terms*, when they were voluntarily terminated by counsel for complainant (Rec., pp. 89–91).

Grounds of Decision by Court Below—Analytical Consideration of Court's Opinions.

When this case was first before the Court of Appeals upon the appeal from the order granting an injunction *pendente lite*, and before any testimony had been taken, the Court of Appeals justified the granting of the injunction upon the ground that the bill charged some wrongful act on the part of the defendants, which, if proved, would justify the court in granting the relief

prayed. The court in its opinion says (Rec., pp. 501–2):

> "But the *circumstances under which this tax deed was procured* are manifestly such as should be investigated by a court of equity. If it was procured, *as alleged in the bill of complaint*, for the purpose of coercing the lessee to give up the property or to afford the opportunity of ousting her from it, so that the other parties who are desirous to lease it should be able to consummate their arrangement with the owner for a new lease of the property to themselves, *then beyond question a court of equity can grant relief against all the parties*, and the tax deed can not be permitted to stand in the way of such equitable relief."

The allegations of the bill, as to the "circumstances under which this tax deed was procured," have already been set forth in detail, followed by the denials in the answers, and specific reference has been given to all the evidence in the record bearing upon the subject, from all of which it is demonstrated that there were no "circumstances" of an unlawful or improper character attending the transaction. At the time of the purchase Wiltsie was the lawful owner of the certificate, with the lawful right, expressly conferred by statute, to sell the same to any person whomsoever, the whole world being his market. Any person could lawfully buy the tax title from him and hold it with all the rights which Wiltsie had under it, and any attempt to impair its use, in the hands of another, by restrictions or limitations which did not apply to it in Wiltsie's hands, would be an impairment of Wiltsie's contract rights, in that it would destroy the unlimited negotiability given to it by the statute of its creation.

This, manifestly, can not lawfully be done. If Wiltsie could have obtained a deed under his tax sale certificate, and could then have lawfully negotiated with the lessor

for its surrender and extinction, then, clearly, his assignees had the same rights, unless they had been guilty of some unlawful conduct in connection with the transaction by which they had destroyed the rights they would otherwise have as such assignees.

That they had done no such act is not only established by the proof, but admitted and found as a fact by the court below, in its opinion on the final hearing, in which it says (Rec., p. 491):

> "We find no evidence whatever in the record of *any fraud* or *wrongdoing* perpetrated by any one concerned."

And the opinion further describes the conduct of these appellants as "*wholly untainted by wrongdoing*" (Rec., 491).

Upon what principle, then, is the complainant's claim to equitable relief founded? The only suggestion in the opinion of the basis of such right is that the tax title is a menace to the complainant's property rights, the court saying that the record disclosed (Rec., p. 491)—

> "A situation from which injury is threatened to the complainant's rights of property and against which she is entitled to be relieved."

But is not the tax title equally a menace to the *lessor's* property rights? If valid, it can not only be the means of defeating the lessee's unexpired term, but can also extinguish the lessor's reversion in fee—a far more serious injury. Has the lessee, by whose default the tax title arose, a paramount right over that of the lessor to undertake the extinction of this tax title for her own advantage, and that, too, after having rejected the opportunity afforded her by Wiltsie between July 24, 1901, and October 1, 1901?

If Wiltsie, during those two months King was chaffering

with him about the price, had offered the surrender of the tax title to the lessor, upon the same terms which he had offered it to the lessee, or upon different terms, can there be any doubt of the lessor's right to accept his offer and to secure the extinguishment of the tax title? And after Wiltsie parted with his tax title had not the lessor the same right to negotiate for and secure its extinction at the hands of Wiltsie's assignee that she would have had if it had remained in Wiltsie's control?

The bill in this case, and the opinions of the court below, appear to proceed upon the theory that she had not and that it was the tenant's paramount privilege to extinguish the tax title in her own time and way, and that if she decided to do so through litigation, which, if unsuccessful, would finally and conclusively establish the tax title instead of defeating it, she had that right, and the landlord could but submit, while any arrangement entered into by the landlord for its certain extinction is invalid, if an element of that arrangement involved the enforcement of the landlord's lawful contract right of re-entry.

Two reasons are suggested by the court below why this extraordinary inequality of rights under the contract should subsist in favor of the lessee. In the opinion on the first appeal the court says (Rec., p. 501):

> "It is urged, however, that the danger of the loss of the title by the lessor as a consequence of the failure of the lessee to pay the taxes which he has covenanted to pay, should take this covenant or agreement out of the category of those with reference to which a court of equity will give relief. But we find nothing in our law that would warrant this distinction. The statute law of the District of Columbia allows ample time for the payment of overdue taxes, with only a reasonable penalty attached; and it allows two years for the redemption of property from sales made for non-payment. *During all this time it behooves lessors*

as well as lessees to be vigilant. A lessor does not escape the duty of vigilance, which is no very difficult duty, to see that the taxes on his property are paid, *when by agreement he has shifted the burden of payment from himself to the lessee, as between themselves.* It is not more difficult for him to make inquiry in this regard for the purpose of preventing a forfeiture than it is to make similar inquiry for the purpose of enforcing a forfeiture. With proper vigilance the only risk to be incurred is at the utmost only the addition of a pecuniary penalty to the amount of the tax.

"It is true that in this case a tax deed has actually been issued, and the ultimate mischief has apparently been done. But the position of the appellant in regard to this does not seem to be entirely consistent. Either this tax deed is valid or it is invalid. If it is valid, then the appellant's title to the property is gone, *and he has no right to re-enter and dispossess the lessee.* If it is not valid, it should interpose no objection to a redemption of the property either by the lessor or the lessee; and the situation is in law as if no tax deed had actually been issued."

These two propositions would seem to establish the principle that for such a breach of contract by the tenant the landlord is remediless. The first borrows from the law of torts and applies to the law of contracts, with even greater force and extent than it has in the law of torts, the doctrine of contributory negligence. According to this decision, notwithstanding the tenants' contract to pay the taxes, the landlord "*does not escape the duty of vigilance,*" and is as much bound to see that the taxes are paid as though the contract had never been made. If, therefore, the landlord neglects, by vigilance, to avert the consequences of the tenant's breach of contract, he loses his remedy of re-entry against the tenant, and if, by vigilance, he does avert the consequence of an irredeemable tax sale, then no irreparable injury is done,

and the tenant is entitled to relief from the forfeiture.

If this be correct the reservation of the right of reentry for condition broken is but a barren pretense instead of a valuable remedial right.

The importance of this question, it is submitted, as a proposition of general law, far outweighs the private interests of the parties to this cause and merits careful consideration by this court.

Tenant's Default Not the Result of Mistake or Accident.

The default in this case, relief from the consequences of which is sought by the bill, has not even the extenuating circumstances of mistake or accident.

So far as the pleading is concerned, the bill makes no pretense that there was any misunderstanding or misinformation of any sort which caused or in any way contributed to the default. Harry King testifies that he and the lessee knew that the lessee must pay the taxes and that they fell due in May and November (Rec., p. 187).

There is no suggestion of ignorance, surprise, or misinformation, and in view of this testimony, that the lessee and her agent knew of the obligation to pay the tax and when it was payable, no such claim can be made.

The only averment in the bill which can be construed as attributing the default to *accident* is in the fifth paragraph, which alleges that (Rec., p. 3)—

> "wholly through *oversight* and *inadvertence*, and *in part* occasioned by the affliction and mental distress suffered by the complainant in consequence of the death of her said husband, added to the perplexity and distraction caused by the unfortunate condition in which his business affairs were found to be after his death, the instalment of the taxes due upon the said property for the second half of the fiscal year ending June 30, 1898, and payable in the month of May of that year, were overlooked and left unpaid."

Conceding, *arguendo*, that this averment amounts to an allegation of accident, what is the accident set up? It is that the non-payment of the tax was due to oversight and inadvertence, and this oversight and inadvertence, if it can be said to be accident within the legal meaning of that term, is alleged to have been, not wholly, but *in part only*, the result of the mental distress of the complainant, consequent upon the death of her husband and the perplexity and distraction resulting from the financial condition of his business. It is to be observed that this alleged cause of oversight is purely personal to the complainant, and not a matter that is alleged to have affected, or which could have affected, a business agent in charge of the matter.

The complainant's husband died on the 15th of August, 1897, and the tax was not in default until the 31st of May, 1898, nearly ten months later. The court below, in its opinion on the final hearing, entirely ignoring the fact that the complainant did not testify at all, and the further fact that the evidence offered in her behalf by her own witnesses conclusively established that she had no more to do with this business than an utter stranger, with reference to this default says (Rec., p. 491):

> "The lessee was *in the midst of financial trouble* and distress caused by the recent death of her husband, who had been the lessee down to the time of his death. The record shows to us quite plainly that the default of the lessee was excusable under the circumstances."

That the death of the complainant's husband was a source of mental distress to her must, of course, be assumed without any reference to testimony, but the record demonstrates that it had no effect upon the successful business activities of her business agent in respect of other matters, and it must not be forgotten that the default referred to occurred nearly a year after this

bereavement. The testimony of her business agent puts beyond peradventure that the *financial difficulties* surrounding her husband's estate had no reference to or influence upon this matter. It appears, from that testimony, that within a fortnight after his death she purchased the business conducted in these premises and that the same was conducted there by her business agent without any co-operation on her part, and that that business was in every respect successful, and that she had ample means to conduct it, and that the taxes and rent due under this lease were paid from it. This business agent, Harry King, testifies that the complainant "had life insurance, quite a lot of it;" that the business there conducted "did not involve the estate, and the estate did not involve the business." "The estate had no bearing upon the business;" "that she bought the stock and leases, but not the debts, and did not become liable for the debts" (Rec., p. 185). Again, that she was not at all embarrassed in the conduct of that business; that the busy season was just approaching, and that she succeeded. She paid promptly all the debts of the business and was "not strained at all, so far as this business was concerned," in meeting liabilities and living expenses. That the business was fairly successful, and she earned something the first year, and when asked to state how much was earned, he says: "I am unable to say, and I do not know that I ought to give the results of our business here" (Rec., pp. 186-7).

In view of the fact that it was incumbent upon the complainant to prove some state of facts which could properly be said to amount to legal accident, and in view of the fact that the only pretense, in the bill, of excuse for oversight is the financial disorder of *her husband's estate*, it is respectfully submitted that proof of the prosecution of a successful business, entirely disconnected from the estate of her husband, in the very

premises covered by the demise, for the purchase and prosecution of which business the complainant had ample capital, does not create a situation which can be properly characterized, as it is in the opinion of the court below, as "financial trouble and distress caused by the recent death of her husband."

The failure to redeem this tax sale, when the opportunity was afforded the complainant, can certainly not, upon this record, be attributed either to mental or financial distress resulting from the recent death of her husband, or the involved condition of his estate. This refusal to redeem occurred *more than four years after her husband's death*, and in the meantime her business had continued to prosper and her agent had refused to sell this leasehold for $15,000 (Rec., pp. 406-7), and was perfectly willing, as the record shows, to imperil the lease and the lessor's title in fee while chaffering with Wiltsie over a difference between them of only $25 (Rec., pp. 55, 175-6).

The court, in its opinion on the first appeal, excuses this negligence in the following terms (Rec., pp. 499–500):

> "And we can not hold that her delay in redeeming the tax certificate was wholly unreasonable, in view of the fact that she had been advised that the sale for taxes was invalid."

If this advice had proceeded from the lessor's counsel, its relevancy would be obvious, but it is not perceived how the advice of counsel, adverse to the lessor, can bar the lessor's remedy, however it may explain the conduct of the lessee.

That it was the lessee's duty to pay the taxes is admitted by the bill. The necessity for the performance of this duty was the protection of the lessor's title. Would it be contended that the lessee could escape the performance of this duty by showing that counsel, adverse to the lessor, had advised that it was not obligatory?

Assuredly not. Clients act upon the advice of their counsel at their own peril, and not at the peril of their adversaries.

But, as before shown, Harry King states in his testimony the precise reason why this tax was not paid in May, 1898, and it is not the reason alleged in the bill. After stating (Rec., p. 187) that he knew the lessee must pay the taxes, that they became due in May and November, and that the tax for November, 1897, was not paid when due, he testifies, in response to Mr. Perry, as follows (Rec., p. 187):

> "Q. When May came around, what did you do? A. *I did not do anything. I had not charged my mind with it at all.*"

And he follows this up with the same answer as to November, 1898; May, 1899; November, 1899, and May, 1900.

Thus, by his positive testimony as to *five successive instalments of taxes falling due after November, 1897, he did nothing at all, because he had not charged his mind with it.*

This, be it remembered, is the evidence for the complainant, and the witness testifying was the one having sole charge of the matter.

It is respectfully submitted that such testimony can not establish accident or mistake, nor support the allegations of the bill, but that it does establish wilful and persistent negligence.

Tenant Not Misled by Lessor, But Given Timely Warning to Observe Covenant and Pay Taxes.

In the opinion on the final hearing the court below appears to attach some blame to the lessor for the failure of the lessee to pay the taxes. In the course of the opinion the court says (Rec., 491):

> "The testimony shows quite conclusively that

> while the lease *required* the annual taxes on the property *to be paid by the lessee*, yet the *invariable* custom of the lessor *down to the time of the default* had been to demand and receive the amount of the taxes from the lessee, and to pay the taxes herself by her own agents. For the taxes of the second half of the year 1898, in connection with which the default occurred, the lessor failed for some reason to make the usual demand for the money wherewith to pay the taxes, and the lessee was in the midst of financial trouble and distress caused by the recent death of her husband, who had been the lessee down to the time of his death."

It is quite true that while Henry King, jr., was lessee, the practice of the lessor was to pay the taxes and to demand a refund from the lessee. But because she had adopted that course with him she was not bound to continue it with every other lessee, and the proof, by the complainant's own testimony, is that the *first* time taxes accrued due *after* the *complainant became lessee*, the lessor held her to the letter of the contract and required the lessee to pay the taxes directly. This is the express testimony of complainant's witness, Joseph King (Rec., p. 154).

This notice to the new tenant to pay the taxes directly, and not to look to the landlord to do so, was given in December, 1897, according to the witness, and the tax was thereupon paid (Rec., pp. 154, 168, 169), while that for which the property was sold did not fall due till the following May (Rec., p. 3, par. 5 of bill). That the lessee and her agents understood the obligation from thenceforth is established by the testimony of complainant's witnesses, who show that no notice was ever thereafter received, and all taxes which were paid were paid by complainant's agent without notice or request from the lessor (Rec., pp. 126, 171, 187, 188).

Furthermore, the pleadings do not make this matter of

the prior practice with the former tenant an issue in the cause, nor an excuse for the default. The bill does not allege that this prior practice with the prior tenant had anything to do with the non-payment of the tax, nor does it even aver that such prior practice existed, but the sole reason assigned for the default is *oversight*, alleged to be due to mental distress consequent upon her husband's death and the condition of his estate (Rec., p. 3). It is nowhere mentioned in any of the pleadings and was apparently unknown to, or forgotten by, the complainant at the time the bill was filed.

The testimony of complainant's witness, Harry King, states the *only* reason why the taxes were not paid, namely:

> "*I had not charged my mind with it at all*" (Rec., p. 187).

The court, therefore, erred in giving that matter any consideration whatever.

Case Presented by Bill Not Such as Equity Can Relieve.

In the absence of any wrong-doing on the part of any of the defendants or of any act by any of them tending to mislead the complainant, the question is simply, can a court of equity relieve from the forfeiture resulting from the non-payment of taxes, where an irredeemable tax sale has been made and the tenant is legally incapacitated from tendering, along with the bill, a complete performance of the covenant and a complete reparation of the breach?

It is worthy of note that in the two opinions delivered by the Court of Appeals in this cause, no reference is made to any judicial decision nor even to any text-book on this question. The court appears to treat it as a fundamental principle that, if the thing covenanted to be

done by the tenant is a part of the consideration for the lease, then, irrespective of the object of the covenant or the consequences from its breach, the covenant is to be treated like the covenant to pay rent, and is therefore relievable in equity. But even a forfeiture for breach of a covenant to pay rent can not be relieved in equity unless the tenant actually pays or tenders the rent. So, why should there be relief from the forfeiture for the breach of a covenant to pay taxes, unless the taxes have been paid and all injuries incident to the breach first removed?

It is submitted, however, that the two covenants are in no respect analogous.

In the case of Gordon *vs.* Richardson, 185 Mass., 492, decided in May, 1904, a little over a year after the decision by the Court of Appeals on the first appeal in this cause, the Supreme Judicial Court of Massachusetts, in a well-considered decision by Mr. Justice Loring, pointedly states the important distinction between a covenant to pay rent and one to pay taxes, and holds that upon reason and authority, the forfeiture for breach of covenant to pay taxes, after a tax sale, *though the tax sale be still redeemable*, is not relievable in equity. The court says (p. 492):

> "The ground on which a tenant gets relief in equity from the forfeiture of his estate for a failure to pay rent is that in equity the landlord's right of re-entry is given as security for the payment of the rent, and on the rent being paid *the very thing is done for which the security was given;* and, although the payment in that case is made after it is due, on interest being paid compensation is made for the delay in performance, and on compensation being made the plaintiff is entitled to relief."

And, further, the court says (p. 493):

> "But that does not cover the case before us.

In this case the defendant entered *for breach of the covenant to pay taxes*, as well as for breach of the covenant to pay rent. When he exercised his right of re-entry in September, 1902, not only was the tax for 1900 not paid, but *the estate of the defendant had been sold because of the plaintiff's failure to pay this tax* as he had covenanted to do. The defendant's estate had been sold to pay this tax in the June preceding the September when the defendant entered on the estate. The thing here in question secured by the right of re-entry, not only has not been performed but it can not be performed now. The tax for 1900 has been paid, and no longer can be paid by the plaintiff. The tax was paid to the collector by the application thereto of the proceeds of the tax sale. *There is a right to redeem this tax title*, but the tax has been paid, and *the thing secured by the landlord's right of re-entry can no longer be performed by the tenant. By the very terms of the covenant secured by the forfeiture, any performance of it is at an end, and that is the end of the plaintiff's application for relief* from the forfeiture in the case at bar.

"Moreover, if it were permissible to look behind the terms of the covenant here in question to what might be termed its true nature and substance, the plaintiff would gain nothing. If you look beyond its terms, *the real substance and nature of a covenant to pay taxes assessed on the demised premises is to protect and hold harmless the landlord's estate. When the breach of the covenant has reached the stage where the landlord's estate has been sold to pay the taxes which the tenant should have paid, and through the default of the tenant a paramount outstanding title has come into existence, we have a breach of covenant for which the plaintiff fails to show that compensation can be made.* It is like the breach of a covenant to insure or repair, where equity does not ordinarily grant relief against forfeiture of the tenant's estate."

If this be a correct statement of the law, then manifestly the complainant's case is wholly without equity, and the bill should have been dismissed.

II.

No Relief Could Properly be Granted Against the Appellants Because of Multifariousness.

This bill seeks, on the one hand, to litigate between the complainant and the lessor the right of re-entry, and between the complainant and these appellants the validity of a tax title not in anywise derived from the lessor, but originating in the paramount right of the sovereign and asserted by the appellants in hostility to the lessor.

There is no pretense of any privity of interest under the lease among the several defendants, or between the defendants Cohen and the Kanns on the one hand and the complainant on the other, while the right of the defendant Kennedy to forfeit the lease, and of the complainant to be relieved from the forfeiture, were questions wholly between complainant and defendant Kennedy.

Obviously the complainant had no legal or equitable right to force a contestation of the tax title to the end that, if successful, complainant should be relieved of the forfeiture, and if unsuccessful the lessor should bear the consequences. The tax title was one created by act of the law. Default having been made in the payment of the tax by the lessee, the tax sale and subsequent execution of a tax deed by the public authorities were lawful acts in pursuance of an obligatory public duty, and by express provision of statute passed to the grantee a *prima facie* title in fee simple. The lessor had the undoubted right to contest the validity of that title, but she was not *compelled* to do so, especially at her own risk, and for the benefit of her defaulting lessee. If she could extinguish the tax title by compromise, without the risk and expense of litigation, upon terms satisfactory to herself, it

is submitted that in the absence of any wrongful act or agreement upon her part, she had the perfect right to do so, notwithstanding such compromise might necessarily involve the termination of the defaulting tenant's lease by the lessor.

By the express terms of the contract of letting, the lessor was given the absolute right to terminate the lease for default, by the lessee, in payment of taxes, and Mrs. Kennedy had done no act by which that right was in anywise impaired.

The bill, therefore, seeks to enforce an unnecessary litigious controversy between the defendant Kennedy and the defendants Kanns and Cohen, with respect to a matter wholly between them and as to which they are able to effect a satisfactory settlement without litigation, solely for the benefit of complainant, as an incident to relief from the forfeiture and at the risk of the lessor. To allow the defaulting tenant thus to experiment with the lessor's title, at the lessor's risk and wholly for the benefit of the tenant, it is submitted is not a part of the equitable right to relief from forfeiture.

The theory of the bill is, that the defendant Kennedy was, in reality, in control of the tax title, though it was vested in another, and that she was having it used merely as an apparent obstacle to relief from the forfeiture. The testimony, however, does not support that contention, but wholly disproves it, as heretofore shown.

There never was any such arrangement between Mrs. Kennedy and any of the parties; she was not, in any way, directly or indirectly, a party to or responsible for the acquisition of the tax title, and from its inception to the present time it has been held in hostility to her. The legal and equitable relation of the parties is, therefore, no different than if Wiltsie had remained the owner of the tax certificate and had obtained a deed for the property instead of passing it to an assignee. Had the

allegations of the bill been sustained by proof and the tax title shown to be in reality in the control of Mrs. Kennedy, as claimed, a contest as to its validity would then, under the theory of this bill, have been unnecessary and improper, because its use and disposition would be wholly within her power, irrespective of its validity or invalidity.

Indeed, such is the contention of complainant in the bill. After alleging certain claimed irregularities as to the tax title, the sixteenth paragraph avers that—

> "Even *independently of the said irregularities and defects* in the said tax proceedings, *the manner of the acquisition of the said tax deed and the circumstances attending the same are, of themselves, of such a character as to render it contrary to equity and good conscience that the said tax title should be allowed to be set up* for the purpose of hindering, embarrassing, and defeating the complainant's right in a court of equity to seek relief against the attempt to enforce the said forfeiture" (Rec., p. 11).

So that, according to complainant's bill, even if the tax title should be decreed to be valid, nevertheless, complainant would still be entitled to the relief prayed against enforcement of the forfeiture, because of the "*manner of the acquisition of the said tax deed, and the circumstances attending the same.*"

The invalidity of the tax title is, therefore, not made an element, under this bill, of complainant's right to relief. Valid or invalid, the contention is that appellants *are barred from setting up the tax title* because of some supposed peculiar equity in the complainant growing out of "the manner of the acquisition of the said tax deed and the circumstances attending the same." The real and only object of the bill in alleging the invalidity of the tax deed is, obviously, to endeavor to mitigate the consequences of the tenants' default and not to found

any relief upon the adjudication of such invalidity. The relief is distinctly claimed independently of such invalidity.

It is respectfully submitted that the lessee can not claim, as an incident to the ordinary right in equity to restrain a re-entry, the right to litigate with these appellants, at the landlord's risk, the question of the validity of the tax title which has accrued through the tenant's breach of condition.

This is not a case of a tax title void upon its face. The deed is "*prima facie* evidence of a good and perfect title in fee simple," and its invalidity can not be established by averment merely, but can only be established by the *judgment of a court* having jurisdiction of the question. The very fact that the court below, in its opinion on the first appeal, submitted that matter to inquiry and even suggested that issues might "*be sent to a court of common law to determine its validity*" (Rec., p. 502) demonstrates that on the case then made for relief there was a question to be tried, which might eventuate *either way*, and the court, in the same opinion, says (p. 501):

> "Either this tax deed is *valid, or it is invalid.* If it is valid, *then appellant's* [lessor's] *title to the property is gone,* and he has *no right to re-enter and dispossess the lessee.*"

The position, therefore, is, that the defaulting tenant may restrain the re-entry by the landlord, until the question of the validity of the tax deed is litigated to conclusion by the tenant, either in the same suit or by ancillary proceedings at common law. If found *invalid* the forfeiture will be relieved against, because no injury has been done. If found to be *valid*, still the landlord can not re-enter, because his title is gone, and the tenant can then defeat the right of re-entry, on the ground that,

through the tenant's own wrong, the landlord has lost his title to the property.

If a result so abhorrent to justice can be achieved by joining these two independent controversies in the one suit, it would seem that no stronger argument against the multifariousness of the bill can be suggested.

III.

The Tax Sale Is Regular and Valid.

It is respectfully submitted that this court should not undertake to determine the question of the validity of the tax title for the reasons already indicated.

If the adjudication of its invalidity is essential to complainant's right to relief, then, obviously, that inquiry should never have been entered upon, but the bill should, for that reason alone, have been dismissed.

Admitting the right of the court in this proceeding to try the validity of the tax title at the suit of the tenant would result in this obvious anomaly, namely:

If the court found the tax title to be valid, which it must be conceded it could do if it can adjudicate upon it at all, instead of placing the parties in *statu quo*, the essential purpose of the relief from forfeiture, the court would be compelled to complete the mischief originating in the tenant's default and destroy the title of both lessor and lessee.

Nevertheless, the court below undertook to enter upon this inquiry, and to adjudge the tax title to be invalid, which these appellants are therefore compelled to assign as error, and the consideration of that branch of the case will now be presented.

In the fifteenth paragraph of the bill the complainant alleges, as to the tax title, that—

> "*the proceedings for the sale* of the property covered by her lease for default in the payment of

> the second instalment of taxes for the year ending June 30, 1898, are *wholly and radically irregular, defective, illegal, and void*" (Rec., p. 10),

and in eight subparagraphs, alphabetically designated from *a* to *h*, both inclusive, sets forth the alleged grounds of irregularity said to render the sale illegal and void (Rec., pp. 10-11).

The answers of the defendants, Cohen and the Kanns, deny the jurisdiction of the court, in this proceeding, to inquire into and determine as to the validity of the tax title, and also deny the allegations of fact as to irregularity in said sale (Rec., pp. 51, 71-72).

The answer of the defendant Webb denies the right of complainant to force a contest of the tax title, and insists upon his right to extinguish it by amicable compromise without the risk and expense of litigation (Rec., p. 83).

Upon examination of the alleged irregularities set out in the bill it will be found that they consist of two classes, viz: Subparagraphs *a* and *h* (Rec., pp. 10, 11) set forth alleged irregularities *in the sale itself*, and subparagraphs *b* to *g* (Rec., pp. 10, 11), both inclusive, set forth alleged irregularities in the subsequent official report of the sale.

Alleged Irregularities in the Sale Itself.

(*a*) *The alleged error in assessing in the name of Maria T. Gillis.*

The first irregularity alleged is that—

> "The statute requires that the property should be assessed '*in the name of the owner or trustee or trustees of the owner thereof,*' and that the advertisement of sale should be in the name of the person against whom assessed. The property in controversy was assessed and advertised in the name of Maria T. Gillis, whereas the defendant,

> Marianne A. B. Kennedy, is, and for the last twenty-five years has been, the owner thereof in fee simple and in severalty" (Rec., p. 10).

The terms of the statute providing for the assessment are as follows:

> "All real property in the District of Columbia, *except as hereinafter provided,* shall be assessed in the name of the owner, or trustee or trustees of the owner thereof. *All undivided real property of a deceased person may be assessed in the name of such deceased person,* until the same is divided according to law, or has otherwise passed into the possession of some other person or persons, and all real property, the ownership of which is unknown, shall be assessed 'owner unknown'" (28 Stat., 282).

The statute regulating the sale provides that the printed notice or advertisement of the tax sale—

> "*shall contain the name of each and every person in which each piece of property is assessed*" (30 Stat., 250).

From the foregoing provisions of law it is seen that the property *must* be advertised *in the same name in which it is assessed,* and that the tax collector has no right to advertise the property in a *different* name from the one in which it is *assessed.* The question, therefore, is not as to the rightfulness of the name used in the *advertisement,* but is as to the name used in the *assessment.*

It may be said, in passing, that the validity of the original assessment can not well be questioned in this proceeding; if there never was a valid assessment, there was no obligation to pay the tax, and that would have constituted a complete defense at law to the landlord and tenant proceedings. The bill, of necessity, admits

the validity of the *assessment*, the obligation of the tenant to pay it, and the validity in law of the forfeiture from which it seeks relief, as a purely equitable remedy.

Gordon *vs.* Richardson, 185 Mass., 492.

Under these conditions it would seem that whatever may have been the rights of Mrs. Kennedy, the complainant is estopped from questioning the regularity of the *original assessment*, and as the law specifically required the property to be *advertised* in the name *as assessed*, the objection of complainant that it was assessed, advertised, and sold in the name of Maria T. Gillis is untenable.

Apart from this answer to the objection of invalidity in the assessment, it is still insisted that the assessment in the name of Maria T. Gillis was regular and valid, and in accord with the terms of the statute.

The statute does, in terms, require that the property "shall be assessed in the name of the owner," but that is not an absolute provision. It is qualified by another and very important exception, which the complainant ignores in the bill. That qualification is that—

> "All undivided real property of a *deceased* person *may be assessed in the name of such deceased person* until the same is divided or has otherwise passed into the possession of some other person or persons " (28 Stat., 282).

It is this provision of the law which is now presented for construction and interpretation, and the real question is, under what conditions property of a deceased person may lawfully continue to be assessed in the name of the deceased owner?

This statute, like all others, must receive a sensible construction in the light of its purposes and objects one which, if possible, will effectuate those purposes and objects, and not one which, through blind adherence to

mere words, in disregard of the legislative intent, will tend to defeat them or to lead to absurd consequences or involve impossible conditions. Such is the rule of construction of statutes adopted and applied by this court.

In the case of United States *vs.* Kirby, 7 Wall., 482, Mr. Justice Field says (pp. 486-7):

> "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter."

In Smythe *vs.* Fiske, 23 Wall., 374, the court in construing a tax law (the tariff act of July 30, 1864), through Mr. Justice Swayne says (p. 380):

> "A thing may be within the letter of a statute and not within its meaning; and within its meaning, though not within its letter. The *intention* of the lawmaker is the law. Revenue laws are to be construed liberally to carry out the purposes of their enactment. Their penal provisions are not penal in the sense that requires a rigidly strict construction."

To the same effect are the decisions in the following cases:

Carlisle *vs.* U. S., 16 Wall., 147, 153.
Atkins *vs.* Disintegration Co., 93 U. S., 634, 638.
Church of the Holy Trinity *vs.* U. S., 143 U. S., 457, 459-60.
Hawaii *vs.* Mankichi, 190 U. S., 197, 212-14.

The object and purpose of this law are to levy and collect taxes for the maintenance and support of the

municipal government of the District of Columbia, without which it could not exist, and the duties imposed upon its agents in the assessment and collection of the taxes must be construed so as to be possible of performance.

The law does not require, as a condition precedent to the right to assess a tax, that the assessors shall have an examination made as to the title to every piece of property taxed and an inquiry into all matters *in pais* affecting such titles down to the day and hour of the assessment. The expense would far exceed the tax in most cases, and the time consumed would be an insuperable barrier to the performance of such a duty.

It is submitted that the taxing authorities were not bound to look *beyond the record title*, and if that showed the title in a certain person the requirement of the law is gratified by assessing in the name of such person. That such was the source to be looked to by the assessors and acted upon is plain from the provisions of the Revised Statutes of the District on that subject then in force and which must be read in *pari materia* with the law in question.

Section 144 of the Revised Statutes of the United States relating to the District of Columbia, which is taken from the act of May 15, 1820 (3 Stat., 590-591), and had, therefore, been in force for seventy-four years, provides that—

> "*The recorder of deeds and the register of wills* shall furnish the proper officer of the District appointed to receive the same, on or about the first Monday in January and July in every year, *correct lists of the transfers of real property* in the city of Washington, during the next preceding half-year, *so far as can be ascertained by the records in their respective offices;* and the District shall make to the recorder and register such compensation as shall be agreed upon, not exceeding six cents for each transfer on such lists."

The requirement in the act of 1894, that the property should be assessed in the name of the owner, must be read in connection with the other statute regulating the sources of information from which knowledge of the owner was to be obtained, namely, from the recorder of deeds and the register of wills, in whose offices transfers of title by deed or devise or descent would ordinarily appear. If the name used in the assessment conformed with the facts ascertained from these sources, can it be said that it is invalid? Can it be that Congress required the recorder of deeds and register of wills to furnish the taxing authorities with the information as to the record title to real estate and required the District to pay therefor, and yet the taxing authorities were not authorized to act upon the information so furnished? Could the owner of property under an unrecorded deed claim that an assessment was invalid because made and continued in the name of his grantor, the owner of the property as shown by the record?

It is respectfully submitted that such a construction of the statute would be unreasonable and insensible, and would lead to absurd consequences, and, in practical effect, repeal the statute by rendering its execution impossible.

What are the facts as to the title to this property, as disclosed by the record?

The property in controversy was conveyed, by a duly recorded deed, from Phineas Bradley, father of Maria T. Gillis, to William A. Bradley, in trust for Mrs. Gillis, in November, 1830 (Rec., pp. 464–5), and in October, 1860, by a duly recorded deed, it was conveyed by William A. Bradley, trustee, to Maria T. Gillis (Rec., pp. 466–7). It must be presumed that the law was complied with and that the recorder of deeds duly informed the assessing authorities of these transfers.

By the evidence in this cause it is established that up

to the institution of this suit there was no record of any deed nor of any judgment or decree of the courts of this District divesting the title of Maria T. Gillis (Rec., p. 468); also that there is no record of any will of Maria T. Gillis in the office of the register of wills, nor any unrecorded will of hers on file there (Rec., p. 469), nor any record of administration upon her estate or of anything relating to her (Rec., p. 469). There was, therefore, no matter of record showing, or other lawful and accessible means of discovering, a devolution of the title of Maria T. Gillis or even the fact that she was dead.

Nor is this all. The evidence in this case establishes the further important fact that though Maria T. Gillis died intestate in January, 1871, leaving the defendant, Marianne A. B. Kennedy, as her only heir at law (Rec., p. 126), yet from 1869 to 1902, *a period of thirty-three years in all, and thirty-one years after the death of Maria T. Gillis*, the property was continuously assessed in the name of Maria T. Gillis (Rec., p. 468), and during all that time, without protest or objection, the taxes were paid in her name (Rec., p. 468).

If this were merely a proceeding in behalf of Mrs. Kennedy to have the assessment for 1898 canceled because made in the name of Maria T. Gillis, would any court afford her that relief in the face of these facts? Can there be any doubt in the mind of the court that the permission in the act of 1894 that "real property of a *deceased* person *may be assessed in the name of such deceased* person" applies to such a case as this?

The act of 1894 has not been judicially construed, but somewhat similar questions have arisen in other jurisdictions, and the validity of the assessments been sustained. The case of Dickison *vs.* Reynolds, 48 Mich., 158, was an action of ejectment in which the plaintiff claimed the property as one of the heirs of Frederick Dickison, to whom the property had passed by partition.

The defendant claimed under a paramount title by tax sale. Judgment was given in favor of the plaintiff, the court holding that the tax sale for the year 1871 was void.

This judgment was reversed by the Supreme Court and the tax sale held valid. The law in force at the time of the tax sale, applicable to the case, provided, among other things, as follows:

> "Sec. 987. The assessment roll shall contain the *names* of the resident persons *liable to be taxed;* full description of the real estate *of such persons,*" etc.
>
> "Sec. 976. The undivided real estate of any deceased person may be assessed to the heirs or devisees of such person, unless occupied by some other person to whom it may be assessed, without designating them by name, until they shall have given notice to the supervisor of division of such estate, and the names of the several heirs and devisees."

In passing upon this statute and the validity of the tax sale, the court, by Mr. Justice Cooley, says (p. 161):

> "The tax sale for the year 1871 is supposed to be invalid because the assessment was made to 'Dickison estate' instead of the heirs at law by name. We think not. The estate was at that time undivided, and the statute—Comp. L., sec. 976—permitted lands to be assessed to the heirs or devisees without naming them. Assessing it to the *estate* was in legal effect assessing it to the unnamed heirs."
>
> . . . . . .
>
> "Our conclusion is that the tax sales for 1871 and 1873 were not shown to be invalid, and that the circuit judge erred in holding them to be so" (page 163).

A case, similar in principle and judgment, was decided by the Court of Appeals of Maryland.

In the case of Moale and others against the Mayor and City Council of Baltimore (61 Maryland, 224), Irving, Justice, in the opinion, says (p. 234):

> "The bill in this case was for an injunction to restrain the city authorities from selling the property of the complainants, the heirs at law of Randall H. Moale, for the payment of certain paving taxes assessed to the estate of Randall H. Moale, and claimed by the city to be a lien on the property."

The ordinance under which the assessment was made is as follows (p. 235):

> "That the City Commissioner be, and he is hereby, authorized and directed to have Hanover street, from Clement street to the shore of the middle branch of the Patapsco River, graded, paved, and kerbed, and to assess upon the *owners* of property on said street, between the streets named, their proportional part of the expenses of said paving, grading, and kerbing, in accordance with existing ordinances and acts of assembly."

Another section of the ordinance provided:

> "That the collector of the city be, and he is hereby, directed to collect said expenses, when so assessed, from said property *owners* as other city taxes are collected."

The court, in its opinion, with reference to the mode of the assessment, says (p. 238):

> "Several exceptions are taken to the method of assessment by the city commissioner, which are relied on to defeat the claim in whole or in part. *First*, it is contended that the ordinance requires the cost to be assessed on the property *owner*, whereas the assessment is made to 'the estate of Randall H. Moale.' This contention is made on the assumption that we might overrule appellants' first objections, as we have done. The

assessment was made in 1875. Randall H. Moale died in 1864. The bill does not allege there had been a partition of the property, and from that fact, and the suit being joint, possibly we might be justified in supposing the property still enjoyed in common. But, *however that may be*, it would seem to be too narrow a point, and entirely too refined, and inequitably technical for a court of equity to declare that the city shall lose the tax and the appellants enjoy the benefits of the improvement without paying anything therefor, by reason of such imperfect designation of the person or property taxed. In common parlance, 'the estate' is not only understood to indicate the property, but the takers of it; and when it is said that an estate is charged with the payment of any claim, it is well understood that those who are to take, with the incumbrance, are to pay it, in due proportion among them. Manifestly this language was adopted not only to designate the property, but also that the former owner was dead, and that there were successors in title whom it was more convenient to designate in mass without separately naming them. After charging 'the estate of Randall H. Moale' as debtor, the assessment proceeds to describe the property particularly, and by metes and bounds. Thus it appears that the requirements of the act of assembly, strictly considered, have not been violated by the ordinance, and that whether the person or the property is to be assessed, in this case it is sufficiently done on both."

It is submitted that by the true requirement of the law as to assessing in the name of the owner the assessor is not bound to go beyond what appears of record as to the title.

Purchasers, mortgagees, creditors, and all other innocent purchasers for value, of real property, are not only permitted to rely upon the record, as to the ownership of such real property, but are bound thereby. Should any

different rule apply to assessments? According to the contention of complainant, if A convey lands to B and B fail to record his deed thereto, an innocent second purchaser for value from A will acquire a perfectly valid title against the real owner; yet an assessment for taxes, in the name of A, repeatedly paid by B, may be avoided by B on the ground that the property was not assessed in the name of the true owner.

It is submitted that this carries the rule governing assessments to an extreme and unreasonable extent, and that it was not the intention of Congress to impose upon the assessors any greater degree of knowledge of the title than a purchaser would acquire from an examination of the record, and that the assessment must be valid if the property be assessed in the name of the one who, of record, appears to be the owner. Especially must this be the case where, as here, the owner repeatedly pays the taxes assessed in the name of the owner of record *for more than thirty years* without disclosing his title or objecting to the mode of assessment.

To hold otherwise is to say that Congress intended to impose upon the municipal government, as a condition precedent to the right to lay a tax, a higher degree of certainty as to the title than is required of it where it purchases the property for full value for a school site or a public highway.

It is submitted that Congress did not intend to clog the levying or collection of taxes with any such impossible conditions to their exercise, and it is believed that no judicial decision can be found in which an assessment in the name of the person in whom the title stands of record has been held to be invalid for that reason.

When, by other provisions of law, as in section 144 of the revision above quoted, the particular source of ascertainment of ownership for the purpose of assessing is pointed out, and that source is the public record of

the transfer of titles, it seems clear that Congress did not intend that the assessor should ignore the record and seek through other means to ascertain a possible owner different from what the record disclosed, especially when the tax was regularly paid, without objection, when assessed in the name of the record owner.

The court below, however, held this assessment, in the name of the deceased owner, to be invalid, upon the authority of the decision of this court in the case of City of Washington *vs.* Pratt, 8 Wheat., 681.

The court, in its opinion, says (Rec., pp. 488–9):

> "Now, it is very clear that this assessment did not comply with the requirement of the act of Congress. A deceased person can not be the owner of property in the sense of the law. Especially can not a deceased person continue for twenty-five years after his death to be the owner of property. Assessment and the other requirements of the tax laws are intended to warn the living owner that his property is being dealt with by the public authorities under their supreme power to divest title in the event of failure to pay the public dues; and that living owner is entitled to the benefit of that warning to its fullest extent and to the most faithful compliance with the provisions of the statute. City of Washington *vs.* Pratt, supra. It will not do, therefore, to take a former owner, and continue his name until it suits the public authorities to change the assessments."

It is respectfully submitted that the decision in that case has no application to the case at bar, as the provision of the statute there under consideration was entirely different from the statute under which this sale was made.

In this case the statute in express words authorizes the assessment of the property in the name of the deceased owner, but under the eighth section of the act of

Congress approved May 4, 1812 (2d Stat., 727), the act involved in the Pratt case, the law not only required the property to be advertised in the name of the owner, but it was necessary to know *who* was the owner and *where* he resided, in order to know *how* to advertise.

By section 8 of the act (2d Stat., 727) it was enacted—

> "that unimproved lots in the city of Washington, on which two years' taxes remain due and unpaid, or so much thereof as may be necessary to pay such taxes, may be sold at public sale for such taxes due thereon."

It is to be observed that this is a very restricted power. It applied to but one class of property—unimproved lots; that is, vacant ground in the new city. It was also confined to the cases in which taxes for two years were in arrear and unpaid. The section also prescribed the manner of the sale of such property, namely:

> "That public notice be given of the time and place of sale by advertising in some newspaper printed in the city of Washington,"

and of this advertising there were to be *three* sorts, as the property might be subject to three different and distinct conditions, namely: "Where the property belongs to persons residing out of the United States," the advertising should be for a period of "at least six months." In those cases—

> "where the property belongs to persons residing in the United States, but without the limits of the District of Columbia,"

the advertising was to be for the period of "three months." In those cases "where the property belongs to persons residing within the District of Columbia or city of Washington," it was provided that the advertisement should be for the space of "six weeks."

It was this piece of legislation, enacted at the time it was, under the peculiar conditions then existing, which was involved in the case of the Corporation of Washington against Pratt and others in 1823 (8 Wh., 681). Not only were the conditions entirely different from those now existing, but the terms of the statute were entirely dissimilar to anything previously or since enacted by Congress with respect to tax sales.

The decision in the case, therefore, is not authority upon any question arising in the case at bar. It is *sui generis*, and the opinion deals not with any general principle or rule affecting tax assessments and tax sales generally, but is confined exclusively to the peculiar terms of the statute then under consideration. Indeed, the court in its opinion says (p. 683):

> "This question, as well as every other in the cause, must find a solution *in the provisions of the law which vests the power to sell.* Where these are explicit and consistent, there is no ground for adjudication but *their literal meaning.*"

In determining the power of the authorities under the statute, the court resorts to the important definitive phrase in the statute "*to whom the property belongs*" as controlling, the court saying (p. 685):

> "But, it is obvious that Congress were very jealous of the exercise of this power over the lots of *absentees;* and, in the previous provisions of this eighth section, they make the right of selling, with reference to the *time of the advertising,* to depend expressly upon *ownership;* not reputed ownership or assessment: 'to *whom the property* BELONGS' are the words of the law."

Nothing could be clearer than the requirement indicated in this statute. No authority existed to sell unimproved lots for taxation until this statute was enacted,

and before property could be offered for sale notice by advertisement was an indispensable requisite.

Before the notice prescribed by that statute could be given, it was incumbent upon the authorities to ascertain not only the actual ownership of the property, but the place of residence of such owner, for the reason that, by the terms of the statute, if the property belonged to a resident of the District, an advertisement of six weeks would suffice; if a resident of the United States without the District of Columbia, the advertisement must be for the period of three months; while, if the property belonged to a resident in a foreign country, the advertisement must be for at least six months.

Had there been an express enactment that in the assessment of the property no regard need be paid to ownership, and that assessing in the wrong name should be in all respects valid, the decision in that case must still have been as rendered, for the conclusive reason that in advertising the property for *sale, the character of the advertisement* was governed by the conditions of *actual ownership and residence of such owner.*

(*h*) *The alleged invalidity in payment of the purchase money.*

The allegation of the bill is that the statute provides that every purchaser at tax sale shall pay the amount of his bid within five days after the last day of sale; that the last day of sale was April 19, 1899, and that Wiltsie did not pay for this property until May 8, 1899 (Rec., p. 11).

This contention of complainant is erroneous in both law and fact. The law does not render the sale void if payment be not made within the five days, while the evidence shows that the payment was made within that time.

The statute provides that the purchaser "shall pay the amount of his bid to the collector of taxes within

five days after the last day of sale," but the consequence of not doing so is declared by the statute thus:

> "If any such purchaser shall not have paid his bid or the same shall not have been collected from him within the time above mentioned, *the Commissioners may set aside the sale* for which the bid was made, and all the rights of the purchaser under such bid shall *thereby* be extinguished," etc. (30 Stat., 250).

Thus, failure to pay within five days does not, *ipso facto*, avoid the sale, but it requires the affirmative action of the Commissioners to avoid it. And they are not *required*, but merely *authorized* to do so. "The Commissioners *may* set aside the sale," is the language of law, and it is "thereby," that is by such affirmative action of the Commissioners, that the rights of the purchaser are extinguished. If, in their discretion, they see fit to accept payment after the expiration of five days they may do so, and the sale is not affected thereby.

Not only is it entirely discretionary with the Commissioners under the statute to set aside the sale or to accept payment after the expiration of the five days from the last day of sale, but even if the Commissioners exercise that discretion and set aside the sale the consequences to the owner are the same. By the express terms of the law, if the Commissioners set aside the sale—

> "the said collector of taxes shall thereupon be held to have bid the amount due on the said lot and to have purchased it for the District" (30 Stat., 250–1).

If it is not then redeemed within the two years allowed for redemption, then by the terms of the statute the Commissioners are to sell the property at public or private sale—

> "and issue to any purchaser of such property a deed, *which deed shall have the same force and effect* as the deed hereinbefore provided for in

this section for property sold at the regular annual sale" (ib., 251).

In this connection it must be remembered that the purpose of the sale is not to load down the municipal government with liens upon or titles to real estate, but the sole object of the statute and the proceedings of sale which it prescribes is to realize, in cash, the revenue sought to be raised by the tax. The importance of allowing the Commissioners this discretion as to the time of payment, and thus enabling them to secure cash instead of liens on real estate, is shown by the evidence in this case, taken by the complainant. From that testimony it appears that there were some *twelve thousand pieces of delinquent property* involved in this sale (Rec., p. 162). About *eight thousand* pieces were sold (Rec., p. 162), of which about *five thousand* pieces were sold to others than the District, realizing *over one hundred and fifty-five thousand dollars in cash* (Rec., pp. 161–2).

It also appears that Wiltsie paid to the District on May 8, 1898, more than five days after the last day of sale, *more than one hundred and two thousand dollars*, and had the Commissioners not exercised the discretion allowed them by law and accepted this sum, the revenues of the District would have been reduced by that large amount. It is respectfully submitted that the law was not designed to produced such a result; that prompt payment by the purchaser within five days was prescribed under pain of losing the purchase wholly for the benefit of the District, unless, in their discretion, the Commissioners saw fit to accept payment after that time.

Payment Was Made in Time.

The evidence shows, however, that payment was made in due time. The statute provides for the giving of a certificate to the purchaser at the tax sale in these terms:

"Immediately after the close of the sale, *upon*

> *payment of the purchase money*, the said collector of taxes shall issue to the purchaser a certificate of sale" (30 Stat., 251).

The certificate issued to Wiltsie is dated April 13, 1899 (Rec., p. 17), the day of his purchase (Rec., p. 159), but was executed April *twenty-fifth*, 1899 (Rec., p. 18), and it recites on its face that "*The receipt of the above taxes, penalties, and costs of sale is hereby acknowledged*" (Rec., p. 18).

As the law did not allow the collector to execute a certificate except "upon payment of the purchase money," and as the certificate recites that it has been paid, in the absence of controlling evidence to the contrary, the officer will be presumed to have done his duty, and the recital in the certificate will be presumed to be true.

The only evidence here is that Wiltsie made a deposit on April *twelfth*, of *ten thousand dollars* (Rec., p. 158), and paid the balance of his purchase money on May 8 (Rec., pp. 158, 162). While it appears that between the 12th and the 19th Wiltsie made purchases far in excess of $10,000 (Rec., p. 159), it does not appear that certificates were issued to him in excess of that sum. In point of fact, the only certificate shown to have been issued to him up to April 25 is the one in controversy, the total amount of which is $148.83, against which the collector had a fund of $10,000 paid by Wiltsie the day before the sale.

As the evidence fails to show that any other certificate was issued to Wiltsie up to April 25, the court can not *assume*, without evidence, that any others were issued; and especially can it not assume, without evidence, that other certificates had been theretofore issued, to an amount in excess of the $10,000 then in the collector's hands, and that, in issuing this, the collector violated

the law and his official duty and inserted in the certificate a false recital of payment.

The evidence, therefore, conclusively shows that the payment was made on April 12, within the time specified by law, and that the objection based upon the time of payment is unfounded in fact.

The Alleged Errors in the Report of Tax Sales.

The alleged errors in the report are specified in subparagraphs lettered *b* to *g*, both inclusive, of paragraph 15 of the bill (Rec., pp. 10-11).

It is to be observed that all these criticisms of the collector's report are based upon alleged defects not claimed to exist in the *original* report, but in a *copy* contained in books in the office of the recorder of deeds. Subparagraph *b* alleges that—

> "The *only* report of any tax sale made in the year 1899 *is recorded* in liber 2391, at folio 411, of the land records of the District of Columbia. . . . If these fragmentary entries can in any manner be connected together so as to make a valid, legal report as required by the statute, which is not conceded, still the *said* report is irregular for the following particulars" (Rec., p. 10).

In that, and the ensuing subparagraphs, the alleged defects said to exist in the *record* of the report are set forth in detail. The answer of the defendants Kanns avers, *inter alia*, that—

> "They are advised and therefore aver that *the law does not require the said report to be recorded* by the recorder of deeds, but *merely to be filed in his office, and no record*, perfect or imperfect, *can affect the validity and accuracy of the original report*, accurately and duly made as required by law and filed with the recorder of deeds" (Rec., pp. 71-2).

Thus the pleadings raised the issue of law as to whether the *record* of the report or the *original* was the proper subject of inquiry, and denied that the *original* was defective. Of course, the complainant had the right to stand upon this issue, but if the regularity of the *original* report was to be attacked the bill should have been amended and the defects, if any, in the *original* report alleged. The bill contains no averments whatsoever as to any defect or irregularity in the *report itself*, but is confined solely to allegations of defects and irregularities said to exist in the *copy* or *record* of that report.

The first inquiry, therefore, is as to whether the alleged *recora* of the report is competent evidence of the *report itself*, all evidence of that kind being denied competency by the answer (Rec., pp. 71–2), and having been formally objected to when offered in evidence in the cause (Rec., pp. 230–231, 233).

The Recording of the Collector's Report Not Authorized by Law.

The only provision of law requiring or authorizing the collector's report of tax sales to be recorded is section 175 of the Revised Statutes of the United States, relating to the District of Columbia, approved June 22, 1874, which provision is as follows:

> "The collector of taxes, or other officer of the District, charged with the duty of selling any real estate in the city of Washington for taxes shall, within ten days after every such sale, *transmit* to the recorder of deeds an accurate report in writing, duly certified, containing a particular description of the property sold, the amount of taxes for the raising of which it has been sold, the names and residence of the person or persons to whom such property belongs, or to whom such taxes have been assessed, and of the purchaser or purchasers, and the amount of the purchase money,

> distinguishing how much has been actually paid and the clear surplus, if any, coming to the proprietor, which report *it shall be the duty of the recorder forthwith to record* among the land records of the District, *and the expense thereof shall be paid by the party who redeems the same.*"

This provision of law is taken from section 2 of the act of Congress of February 20, 1819 (3 Stat., 486).

The sixth section of the act of March 3, 1877 (19 Stat., 398), provided only that the collector should file a report with the comptroller, and contained no reference to or provision for the filing of a report with the recorder of deeds.

The act of February 6, 1879 (20 Stat., 283), provided that the collector should keep *in his own office* a list of all tax sales, open to public inspection, and this act also contains no provision for filing or recording such a report in the office of the recorder of deeds.

The fifth section of the act of February 28, 1898 (30 Stat., 252), provides that—

> "The collector of taxes shall, within twenty days after the last day of the sale hereinbefore provided for as aforesaid, *file* with the recorder of deeds a written report, in which he shall give a statement of the property sold, other than that sold to the District of Columbia, to whom it was assessed, the taxes due, to whom sold, the amount paid, the date of sale, the cost thereof, and the surplus, if any."

In the case of Bride *vs.* McFarland, 18 D. C., 120, the Court of Appeals decided that the act of March 3, 1877, and the several acts amendatory thereof constitute the tax laws of this District, and with reference to the act of February 28, 1898, said (p. 125):

> "In the first place, the act of 1898 *is intended as a general comprehensive system of procedure for the listing, advertising, and sale of property for*

taxes. It is not intended to be a mere auxiliary method prescribed to a preexisting method. *It was intended to take the place of a system previously prescribed,* in which it was supposed there were defects that required legislative change in detail, but not in the system itself. . . . It was intended to take the place of the system that had prevailed with the additions and modifications made thereto; and that being the case, it plainly comes within the principle that where two acts, though not in express terms repugnant, yet if the later act covers the whole subject of the first *and embraces new provisions* plainly showing that it was intended as a substitute for the first, it will operate as a repeal of that act; the presumption being that it was not the intention of the legislature that two or more acts relating to and covering the same subject-matter should remain in force together.

. . . . . .

"The act of February 28, 1898, was manifestly intended by Congress simply as *a substitute for all preceding legislation upon the subject of the method of proceeding for the collection of taxes and of making tax sales* of the property of delinquent taxpayers."

A comparison of the provisions of section 175 of the Revised Statutes with the fifth section of the act of February 28, 1898, shows that the two can not stand together. The earlier act requires the report to be made "within *ten* days," while the later prescribes "*twenty* days;" the earlier act requires the report to contain "the names *and residence* of the persons to whom such property *belongs* or to whom such taxes have been assessed," while the later only requires it to show "to whom it was assessed;" the earlier act requires the report to show "the clear surplus, if any, coming to the proprietor," while the later act does not.

The first act requires that the collector shall "transmit to the recorder of deeds" the report, "which report *it*

shall be the duty of the recorder forthwith to record among the land records," and further provides that "*the expense thereof shall be paid by the party who redeems the same,*" while the later act merely provides that the collector shall "*file* with the recorder of deeds a written report," making no provision for its record and no provision for *paying the expense of such record.*

By examination of the provisions of the revision regulating the office of the recorder of deeds, it will be seen that a distinction is made between cases of filing *and recording*, and mere *filing*. Section 470 fixes the fees, and "for filing, recording, and indexing" an instrument of two hundred words or less allows fifty cents and fifteen cents additional for each additional one hundred words, while for the mere service of "filing and indexing any paper by law required to be filed in his office, fifteen cents."

It is quite clear from the comparison of the two statutes that when Congress intended to have the tax collector's report *recorded* among the land records, it expressed that intent in plain and unmistakable terms. It not only specifically directed that it be *recorded*, but specified how the expense of its record should be paid. The testimony in this case shows that the recorded report required more than two volumes of about five hundred pages for its record (Rec., pp. 229–232–3). The cost of *filing* is only fifteen cents for the entire report, as provided by law, while for *recording* the cost is fifty cents for the first two hundred words and fifteen cents per hundred for all additional words, for which expense no provision is made in the late statute.

No necessity for its actual transcription into the record books existed. For the purpose of notice to purchasers, all the world is advised by the law of the right to tax the property and that the tax is a lien upon it, and a statute requiring a report to be made and filed or kept

in any public repository is notice to the world of the place in which information on the subject is to be found.

The unofficial copy or record of the report can not, therefore, take the place of the original, which the law requires to be filed and to which all persons rightfully interested are referred. Not only is this alleged record of the report unofficial, but the undisputed evidence in this case shows it to be grossly inaccurate in fact and not a true copy of the original. This is demonstrated by comparing the extracts of the first page from the copy or record in the recorder's office (Rec., 230–1) with the same extracts from the original (Rec., 470–1), and also the extracts from another page of the recorder's copy or record (Rec., 234–5) with the extract from the same part of the original (Rec., 160–1).

Thus, in the copy made in the recorder's books the signature "E. G. Davis, Collector of Taxes, D. C.," is wholly omitted from the formal report (Rec., 230), though it appears in the original (Rec., p. 470) and is appended, in the recorder's copy, to a descriptive memorandum or index (Rec., p. 231), where it does not appear in the original (Rec., p. 470.)

So, in the description of the property sold and to whom assessed, the recorder's copy reads "Maria T. Gillis, To whom assessed" (Rec., 234), while the original reads "To whom assessed, Maria T. Gilliss" (Rec., 160). So in the description of the items of sale, the recorder's copy reads "2 half tax for year 1898" (Rec., 234), while the original reads "2nd half of tax for year 1898" (Rec., 160). Various other omissions, interpolations, and transpositions in the copy will readily be seen upon inspection and comparison of the copy with the original, not necessary to be set out in detail, as sufficient has already been set out to demonstrate that the alleged copy is not a copy.

It is respectfully submitted, therefore, that the alleged record, being unofficial, is not evidence in and of itself,

and not having been properly proved or offered as secondary evidence, and being in fact shown to be inaccurate and not a copy, is inadmissible for any purpose; and further, the bill not having alleged any defect in the original, defects in that, even if shown to exist, could not be considered in derogation of the tax title, as the sound and well-established rule is that a party can no more prevail upon a case proved and not alleged than upon one alleged and not proved.

The Alleged Defects in the Report Set Out in the Bill of Complaint Do Not Exist in the Report.

b.

The first defect alleged is that the report—

> "is made *not by the collector of taxes*, but by John B. Wight, John W. Ross, and Lansing H. Beach, Commissioners of the District of Columbia" (Rec., p. 10).

The first essential to the consideration of this alleged defect is a proper understanding of the law governing the making of the report. The old law of 1819, afterward section 175 of the Revised Statutes relating to the District of Columbia, provided that the collector of taxes shall "transmit an accurate report in writing, *duly certified*," while the fifth section of the act of February 28, 1898, under which this report is made, provides that the collector of taxes shall—

> "file with the recorder of deeds a written report in which he shall give a statement of the property sold," etc. (30 Stat., p. 252).

There is no requirement in this law that it shall be "*made*" by him, that he shall sign it, or that it shall be "duly certified," as required by the old law, and his signature is not made an essential to its validity.

The evidence in this case is not disputed that he did sign the original report, and his signature appears thereon (Rec., p. 470). His signature also appears in the incorrect copy in the recorder's records, also, though not in the same place as in the original (Rec., p. 231), and as the law does not specifically require a signing, a signing upon any part of it and its subsequent filing, it is submitted, is sufficient evidence that it is his report, filed by his authority.

The formal portion of the report, to which his signature is appended in the original, is as follows:

> "We hereby certify that the following exhibit is a true statement of sales of property to individuals at the tax sale, April 12 to 19 (inclusive), 1899.
>
> "All other property delinquent and sold at said sale was bid in by and in the name of the District of Columbia.
>
> JOHN B. WIGHT,
> JOHN R. ROSS,
> LANSING H. BEACH,
> Commissioners of the District of Columbia.
> E. G. DAVIS,
> (Rec., p. 470.) Collector of Taxes, D. C."

It could not, with any reason, be contended that this is not his report if it were signed by him only, but the fact that the Commissioners also sign it is claimed to have a vitiating effect upon the whole report. If this contention be sustained and the report held to be irregular and the sale invalid, then not only *this* sale but *all* sales made in April, 1899, would be invalid, and the consequence would be that the District must return to the purchasers the entire purchase money, amounting, as the record shows, to $155,104.51 (Rec., pp. 161–62), because the sixth section of the act of February 28, 1898, requires

that if the sales are invalid and ineffectual to give title to the property sold, the Commissioners—

> "shall cancel the sale and cause the purchase money to be refunded to the purchaser, his representatives or assigns" (30 Stat., 252).

It is submitted that, by the terms of the statute, the signature of the Commissioners, in addition to that of the collector, did not make it *their* report and not *his*, nor in any respect vitiate his act. On the contrary, in view of certain other provisions of the statute, it was eminently proper that they, also, should sign the report.

The second section of the act of February 28, 1898, provides that—

> "upon the day specified, aforesaid, the *Commissioners* shall proceed to sell, or *cause* to be sold, any and all property upon which such taxes remain unpaid, and continue to sell the same every secular day, until all the real property, as aforesaid, shall have been brought to auction and sold" (30 Stat., 250).

Their signing the report was, therefore, an evidence that the sale was made by them or by their authority. Without that it might be questioned whether they had themselves made the sale, or had authorized another to do so. By signing the report of the collector they recognized and admitted their knowledge and sanction of the sales. If made by themselves, attested the fact. If made by another, they thus attested that they had *caused* it to be sold. It would be in the highest degree unreasonable to hold that the report, signed by the collector, was not his report within the meaning of the statute, merely because those whom the statute authorized "to sell or cause to be sold" the delinquent property had also signed the report, in evidence of the due authority for the sale.

The mere fact that the law did not require the report to show by whom the property was actually sold, and if not by the Commissioners themselves, then that they had caused it to be sold, would not render the report invalid because it did show that fact. Including such a showing in the report would be a mere superfluity, affecting no rights and in no respect altering the legal effect of the report.

As above shown, the fact that they sign the report is properly to be regarded as evidence that they had either themselves sold or else caused the property to be sold, but if not so treated it is nothing more than their attestation of the correctness of the collector's report, which, however unnecessary it might be, could not invalidate it.

c, d, e, f, g.

The substance of the allegations in these subparagraphs is that the report is defective in that it does not set forth, as required by the statute, (*c*) the taxes due, (*d*) the amount paid at the sale, (*e*) the date of the sale, (*f*) the cost of the sale, and (*g*) to whom it was sold (Rec., p. 10).

An inspection of the report will show that it is arranged in tabular form and that it sets forth the taxes for which sold as being the "2d half of tax for year 1898," and the amount as "128 50," and "penalty" of "14 13" (Rec., p. 160), thus clearly designating the taxes due for which the sale is made. There is also added the "advertising" "1 20" (Rec., p. 160), the only cost of sale allowed to be charged, as specified in section 7 of the act (30 Stat., 252), with the aggregate of "143 83" footed at the bottom of the column under "amount sold for" (Rec., p. 160), thus plainly showing the tax, penalty, the only authorized cost of sale, and the total amount for which sold.

The table is headed "Real Estate Tax Sale, District of

Columbia, April —, 1899," while in the column giving the specific date is the date of "April 13" (Rec., p. 160).

Under the caption of "purchaser" is given, in the next preceding parcel, the name of "C. H. Wiltsie," immediately under which is placed the usual abbreviation for ditto, "do." (Rec., p. 160), showing Wiltsie to be the purchaser of this parcel also.

It is respectfully submitted, therefore, that this report does, in all substantial respects, answer the requirements of the statute, and that there is nothing in it which could be held to be in any way misleading.

That these alleged criticisms of the report are without real merit, if not frivolous, must be apparent on examination of the statute. The report has *no relation to the assessment or sale* and can not affect either, since it is a requirement *subsequent* to the assessment and sale, after which there are no rights to be affected *except the right of redemption.* As to this right, it is plain, from the statute, that the mere *fact* of sale is the only matter in the report in which one having the right to redeem is interested or in anywise concerned.

If every other statement in the report than the bare fact that the property had been sold were erroneous it could not, in any way, mislead or injure one having the right to redeem.

The provision of the law as to redemption is contained in the fourth section of the act, and is as follows:

> "That the owner or authorized agent of the owner of any property sold as aforesaid, or any other person having an interest therein at the time of sale, may redeem the same from such sale at any time within two years after the *last day of sale* by paying to the *collector of taxes for the use of the purchaser, his heirs and assigns,* the sum mentioned in the *certificate of sale* therefor, with interest thereon at the rate of fifteen per centum per annum after the *date of such certificate of sale,* together with any tax or assessment

> which the holder of said certificate shall have paid between the days of sale and redemption, with interest on the same at the rate of ten per centum per annum" (30 Stat., 251–2).

The important fact of the *time* for redemption can not be ascertained from the report. The time for redemption does not begin to run from the *date of sale*, which the report is required to give, but from the "*last day of sale*," which the report is *not* required to state. The amount required to redeem is not the *amount of the tax due*, or for which the *property was sold*, or the *costs of sale*, as stated in the report, but the "sum mentioned *in the certificate of sale*," with fifteen per centum interest thereon, not from the date of sale or even the last day of sale, but from the "*date of such certificate of sale*," together with any taxes which the holder of the certificate may have paid in the interim, with interest upon that sum at ten per centum per annum.

Nor is the property to be redeemed from the person *to whom sold*, as shown in the report. The payment is not permitted to be made to the person to whom the report shows it to have been sold, but is to be to the "*collector of taxes*, for the use of the purchaser, *his heirs and assigns*," the collector being thus made the agent of whomsoever at the time may be the holder of the certificate. This is essential, because, as the certificate is assignable, the owner would have no means of discovering the holder of the certificate and of making payment to him.

From these provisions of law it is seen that the only fact which the report shows which could affect the right of redemption is the fact that sublot A, in square 432, was sold, which fact is not denied by the bill and plainly appears in the report, and payment must be made to, and all necessary information for the purposes of redemption obtained from, the collector of taxes.

Even if the objections to this report were well founded in fact, they are shown to be frivolous in law, since they affect no right of any party in interest. By law any party in interest is required to seek elsewhere for the facts as to the time for redemption, the amount to be paid, and the person holding the certificate of sale.

Had the complainant in this case sought to redeem, the time for redemption would not have run from April *thirteenth*, the day of sale, but from April *nineteenth*, the last day of sale. The amount to be paid would not have been the amount stated in the *report*, but the amount stated in the certificate of sale, with fifteen per centum interest from April *twenty-fifth*, the date of the certificate, and intervening taxes, if any, paid by the certificate holder with ten per centum interest. And payment could not be made to Wiltsie, the purchaser named in the report, but must have been made to the collector of taxes.

IV.

Costs Should Not Have Been Adjudged Against These Appellants.

The decree of the court below adjudges the defendants, Kann and Cohen, to pay one-half the costs in this case (Rec., p. 483).

Counsel is unable to comprehend upon what principle this condemnation to costs is based. No one of these appellants had done any act against the complainant or taken any steps to enforce the tax title against the lessor. The lessor had invited them to become tenants, and had actually taken steps to enforce the forfeiture against the lessee before these appellants had acquired the tax title, which the complainant had refused to buy because she could not secure it at her own price, and which the lessor's counsel had also declined to buy when Cohen suggested that he do so.

The only acts done by the appellants, up to the time the bill was filed, were to acquire, by purchase, the tax title, and to offer to surrender it to the lessor upon terms satisfactory to the lessor.

The court has said, in its opinion, that the conduct of these appellants is "wholly untainted by wrong-doing" (Rec., p. 491), yet they are condemned to pay one-half of the very heavy costs in this litigation, occasioned solely by the complainant's breach of contract and subsequent wilful refusal to repair the breach at trifling cost when given the opportunity to do so.

It is respectfully submitted that the decree appealed from should be reversed, with costs, and the cause remanded to the court below, with directions to enter a decree dismissing the bill at the complainant's cost.

WM. G. JOHNSON,
Counsel for Appellants.